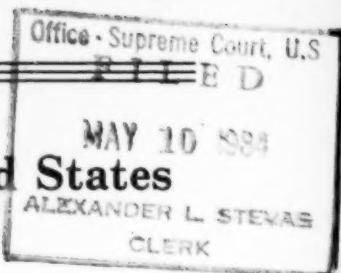


083-1851

No.



IN THE
Supreme Court of the United States

October Term, 1983

STATE OF ALASKA,
Respondent,

v.

F/V BARANOF, its gear, paraphernalia, etc.;
BARANOF FISHERIES, a Washington Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee for
Universal Seafoods, Ltd.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Magnuson Fishery Conservation and Management Act of 1976 (Fishery Conservation and Management Act), 16 U.S.C. §§ 1801-82, grants federal courts exclusive subject matter jurisdiction to enforce state fishery regulations beyond the state's seaward boundary.
2. Whether a suit based upon extraterritorial state enforcement activities arises under the Fishery Conservation and Management Act.
3. Whether registration of a vessel under state law, for purposes of the Fishery Conservation and Management Act, includes state fishing license registration.
4. Whether the Fishery Conservation and Management Act preempts state regulation of out-of-state vessels operating beyond the state's seaward boundary.
5. Whether the Supreme Court of the State of Alaska improperly extended Alaska's *in rem* admiralty jurisdiction onto the high seas contrary to precedent and the Constitution and laws of the United States.
6. Whether the assertion of the Supreme Court of the State of Alaska of *in rem* admiralty jurisdiction for vessel forfeitures is inconsistent with and contrary to the exclusive federal district court jurisdiction granted to preferred ship mortgage holders and maritime lienors under 46 U.S.C. §§ 911 to 984.



LIST OF PARTIES

The caption of the case in this Court contains the names of all parties. Rainier National Bank is a national banking association which is a wholly owned subsidiary of Rainier Bancorporation, a Washington corporation. Other wholly owned subsidiaries of Rainier Bancorporation have interests in Rainier Venture Partners, Menlo Investment Partners, H & Q Ventures III, Western Investment Associates II, Orient Capital Trust, BHC Securities, Inc., and Menlo Venture Corporation. Universal Seafoods, Ltd., is a Washington corporation. Larson Bay Seafoods, Inc., an Alaska corporation, is a subsidiary of Universal Seafoods, Ltd. and Dutch Harbor Seafoods, Ltd., a Washington corporation, Pacific Rim Seafoods, Ltd., a Washington corporation, Intersea Fisheries, Ltd., a New York corporation, Oversea Fisheries, Ltd., a Washington corporation, Courageous Fisheries, a Washington partnership and North Star Seafoods, Ltd., a Washington corporation, are affiliates.



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BARANOF FISHERIES, a Washington Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee for
Universal Seafoods, Ltd.,
Petitioners.

The F/V BARANOF and its owner, BARANOF FISHERIES, a Washington Limited Partnership, together with RAINIER NATIONAL BANK, both as the holder of a preferred ship mortgage on the F/V BARANOF and as trustee for Universal Seafoods, Ltd. on a second preferred ship mortgage (collectively referred to herein as 'BARANOF') petition the Court for a Writ of Certiorari to the Supreme Court of the State of Alaska to review the judgment of that court rendered in this cause.

OPINIONS BELOW

The February 10, 1984 opinion of the Supreme of the State of Alaska (App. A, *infra*) is not yet reported in the official reporter. The decision of the Superior Court for the State of Alaska, Third Judicial District (App. B, *infra*), is not officially reported.

JURISDICTION

The opinion of The Supreme Court of the State of Alaska was filed on February 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions (App. D, *infra*):

U.S. Const. art. III, § 2; art. IV, § 2 and art. VI, cl. 2

United States Statutes (App. E, *infra*):

Magnuson Fishery Conservation and Management Act
of 1976, 16 U.S.C. §§ 1801, 1811-12, 1851-57, 1860-61

28 U.S.C. § 1333

46 U.S.C. §§ 911, 951, 961

1 Stat. 76-77 (Section 9 of the Judiciary Act of 1789)

Alaska Statutes (App. F, *infra*):

§ 16.05.190 Seizure Without Warrant and
Confiscation by Court

§ 16.05.195 Forfeiture of Equipment

§ 16.05.475 Registration of Fishing Vessels

§ 16.05.920 Certain Acts Made Unlawful

§ 16.10.210 Unlawful Sale or Offer Prohibited

Regulations of Alaska Board of Fish & Game, Alaska
Admin. Code, title 5 (1980) (App. G, *infra*):

§ 34.085(a) Agreements for Use Privilege

§ 34.090 Unlawful Possession of King Crab or
King Crab Gear

§ 34.810 Fishing Seasons

§ 39.120 Registration of Commercial Fishing
Vessels

§ 39.130(e) Reports Required of Processors, Buyers
and Fisherman

§ 39.197 Unlawful Possession of Fish

Alaska Court Rules (App. H, *infra*):

Alaska Court Criminal Rule 37

STATEMENT OF THE CASE

The F/V BARANOF is a combination catcher/processor that fishes for and processes salmon, king crab, and other seafood, both within and without the territorial sea of the state of Alaska. It is homeported and documented in Seattle, Washington, and is owned by Baranof Fisheries, a Washington limited partnership. The F/V BARANOF is subject to two preferred marine mortgages: a first preferred marine mortgage in favor of Rainier National Bank, a national banking association, and a second preferred marine mortgage in favor of Rainier National Bank, as trustee for Universal Seafoods, Ltd., a Washington corporation.

The Alaska State Division of Fish & Wildlife Protection seized the F/V BARANOF in Dutch Harbor, Alaska, on May 9, 1981, for alleged violations of Alaska Fish & Game statutes and regulations, including Alaska Stat. §§ 16.05.920(a), 16.10.210, and Alaska Admin. Code, tit. 5, §§ 34.085(a), 34.090, 34.810, 39.130(e), 39.197. The claimed violations of Alaska law by the F/V BARANOF occurred during the time the vessel was operating outside the three-mile Alaskan seaward boundary, but within the fishery conservation zone established by the Fishery Conservation and Management Act.

On May 11, 1981 the state of Alaska filed a civil suit in the Superior Court for the State of Alaska, Third Judicial District at Kodiak, seeking forfeiture of the F/V BARANOF pursuant to state regulations governing fishing for king crab. BARANOF filed a petition for removal of the case to the United States District Court for the District of Alaska. The federal court, however, remanded the case to the superior court on the basis that jurisdiction for removal could not rest on federal claims raised in defense and not ascertainable on the face of the plaintiff's complaint. Thus, the jurisdictional effect of the Fishery Conservation and Management Act was left for state court determination. *See App. C, infra.*

BARANOF then filed a motion in the state superior court seeking dismissal of the state's complaint upon the following four bases: (1) the Fishery Conservation and Management Act confers exclusive jurisdiction on the federal courts for any fishing violation occurring seaward of the three-mile territorial boundary of the state; (2) the United States District Courts have exclusive and original admiralty jurisdiction under the United States Constitution, art. III, § 2 and under 28 U.S.C. § 1333 of all *in rem* proceedings over a documented United States vessel; (3) the Ship Mortgage Act, 46 U.S.C. §§ 911-984, mandates federal jurisdiction to consider competing mortgage and lien claims to the vessel; and (4) seizure of the F/V BARANOF without a prior hearing violates BARANOF'S due process rights under the Fourteenth Amendment. The superior court granted BARANOF'S motion to dismiss on the basis that the Fishery Conservation and Management Act provides exclusive federal jurisdiction for the state forfeiture action, but rejected the other three contentions of BARANOF. See App. B, *infra*.

The state of Alaska filed an appeal with the Supreme Court of the State of Alaska, and BARANOF filed a cross-appeal challenging the superior court's denial of the motion to dismiss on the three alternate bases.

On February 10, 1984 the Supreme Court of the State of Alaska reversed the superior court's dismissal of the complaint on the federal court subject matter jurisdiction issue, affirmed the decision on the federal admiralty issues, and concluded that the superior court had jurisdiction to proceed with the forfeiture action.

Although all parties had agreed that the original dismissal by the superior court did not rest upon federal preemption of state authority outside state waters, but upon the exclusive subject matter jurisdiction or exclusive forum of the United States district courts over any suit involving fishing violations occurring within the fishery conservation zone, the supreme court of Alaska disagreed and decided the preemption issue, finding that the Fishery Conservation and Management Act did not preempt state authority to regulate fishing outside its territorial sea. App. A at A-8, n. 1.

The supreme court then held that the state of Alaska could regulate the fishing of king crab outside state boundaries, provided such fishing occurred from a vessel registered under the fishing laws of the state of Alaska. App. A at A-22-23. The court concluded that the F/V BARANOF was registered under Alaska law within the meaning of 16 U.S.C. § 1856(a) because the F/V BARANOF had purchased an Alaska fishing license and was registered to fish in Alaska. App. A at A-23. Then, reasoning that it was "self-evident" that the present action arose under Alaska state law rather than the Fishery Conservation and Management Act, the supreme court held that federal courts did not have exclusive jurisdiction over this case. App. A at A-26.

The Alaska supreme court also affirmed the superior court's denial of the motion to dismiss on the alternate admiralty grounds. First, the court held that the state of Alaska's forfeiture action was a cause of action allowed under the common law in 1789, and thus was within the "saving to suitors" exception to the exclusive original federal jurisdiction of United States district courts of all *in rem* proceedings in admiralty. App. A at A-34.

Next, the court noted that the Ship Mortgage Act of 1920 provides exclusive federal jurisdiction only over actions to foreclose preferred ship mortgages. Although the state forfeiture decree may extinguish the right of secured parties, the court reasoned that the Ship Mortgage Act did not bar state jurisdiction of a state forfeiture action against a vessel. App. A at A-35.

Finally, the court held that the owners of the F/V BARANOF were afforded procedural due process, despite the Alaskan forfeiture statute's failure to provide a hearing either prior to or immediately after seizure of the vessel, because the owners had an immediate right to contest the state's seizure pursuant to Alaska Court Criminal Rule 37 and because the state of Alaska filed a civil complaint on the next working day following the seizure and promptly notified the owners.

REASONS FOR GRANTING THE WRIT

1. Review of the Judgment of the Supreme Court of the State of Alaska Is Timely and Appropriate.

The jurisdictional determination of the Alaska supreme court is a final, reviewable judgment under 28 U.S.C. § 1257. The federal question raised by BARANOF in the Alaska courts and before this Court is whether the state courts or the federal courts have the sole power to proceed with and determine the controversy between the parties, a matter wholly separate and independent from the merits of the case. The jurisdictional ruling of the supreme court falls within the class of judgments treated as final for purposes of review, even before trial on the merits, because the judgment "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 549 (1963).

The jurisdiction of the Alaska courts has been finally determined by the decision of the Alaska supreme court and is not subject to further review in Alaska state courts. A determination now of appropriate subject matter jurisdiction over this action serves the finality requirements of 28 U.S.C. § 1257 by avoiding duplicative proceedings and a full trial in the wrong forum. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963).

2. This Case Is One of First Impression Regarding Federal District Court Subject Matter Jurisdiction Under the Fishery Conservation and Management Act.

The decision of the Alaska supreme court provides the first opportunity for this Court to settle and determine the jurisdiction of the federal district courts under the Fishery Conservation and Management Act. The decision by the court that Alaska state courts have jurisdiction

to enforce Alaska fishing regulations beyond the Alaska territorial sea is contrary to the exclusive federal jurisdiction provisions of the Fishery Conservation and Management Act and will have a significant impact on federal/state relations with respect to management of the fishery resource.

The state courts of Alaska do not have jurisdiction to enforce fishing regulations outside Alaskan boundaries and within the fishery conservation zone, which is the area between the state's three-mile seaward boundary and the United States' 200-mile boundary, established by the Fishery Conservation and Management Act. 16 U.S.C. § 1811.

While the Fishery Conservation and Management Act leaves undisturbed state authority to control its own territorial waters, and allows limited concurrent coastal state regulatory authority within the fishery conservation zone over vessels registered under the laws of the coastal state, 16 U.S.C. § 1856(a), the United States is given exclusive fishery management authority over all fish within the fishery conservation zone. 16 U.S.C. § 1812.

The different treatment of state authority within state waters, preserved in the first sentence of Section 306(a) of the Fishery Conservation and Management Act, 16 U.S.C. § 1856(a), and state authority beyond state boundaries, specifically granted in the last sentence of Section 306(a) of the Fishery Conservation and Management Act, 16 U.S.C. § 1856(a), on the condition that the vessel to be regulated is registered under state law, evidences the Congressional intent that any and all state authority to regulate fishing in the fishery conservation zone now arises only from the Fishery Conservation and Management Act. The state fishing regulations thus become part of the federal regulatory scheme in the fishery conservation zone.

Section 311(d) of the Fishery Conservation and Management Act, 16 U.S.C. § 1861(d), grants exclusive jurisdiction to the district courts of the United States over all cases

"arising under" the provisions of the Fishery Conservation and Management Act, including any regulation or permit "issued pursuant to this chapter". 16 U.S.C. § 1861(e)(1)(a).

By concluding, *sua sponte*, that the Fishery Conservation and Management Act does not preempt Alaska's political jurisdiction over the F/V BARANOF'S fishing activities outside the territorial waters of the state, the Alaska supreme court has rejected all of BARANOF'S federal defenses under the Fishery Conservation and Management Act and has left BARANOF subject to prosecution under state law, in a state forum, contrary to the explicit provisions of the Fishery Conservation and Management Act.

Review by this Court should be granted to firmly and finally preserve the exclusive authority of the federal district courts under the Fishery Conservation and Management Act.

3. Review Is Necessary to Preserve Uniformity.

Review of this matter is necessary to preserve the federal policy, reflected in both the exclusive jurisdiction and regional regulation features of the Fishery Conservation and Management Act, of promoting uniform interpretation and application of fishing regulations outside state territorial waters.

Exclusive federal court subject matter jurisdiction over all cases involving fishing in the fishery conservation zone will provide uniform interpretation and application of fishing regulations within the zone. Congressional concern with uniform interpretation and application of fishery regulations outside the state waters is manifested in its prohibition of state regulation of out-of-state vessels in the fishery conservation zone, 16 U.S.C. § 1856(a), and by its establishment of a regional, rather than a state-by-state, approach to regulation outside state waters. 16 U.S.C. §§ 1851-1853. The legislative history of the Fishery Conservation and Management Act reflects the Congressional rejection of a regulatory scheme allowing each state to

regulate the waters outside its boundaries. See Committee on Commerce and National Ocean Policy Study, 94th Cong., 2d Sess., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION & MANAGEMENT ACT of 1976 at 847.

Review by this Court is necessary to preserve and enhance the federal regulatory scheme.

4. Review Is Necessary to Finally Delineate Federal and State Relationships in Fishery Resource Management.

The decision of the Alaska supreme court involves the first interpretation of the extra territorial authority of the coastal states under the Fishery Conservation and Management Act as compared to the federal government, the Secretary of Commerce and the regional fishery management councils. Regulation of the crab fishery outside state boundaries is exclusively federal unless the vessel to be regulated is "registered under the laws of such state", 16 U.S.C. § 1856(a), and then only if the state regulation does not conflict, directly or indirectly, with any federal regulation.

The decision of the supreme court through its broad interpretation of the registration prerequisite to state regulation of vessels in the fishery conservation zone, has extended the authority of the state of Alaska to encompass virtually all fishing activity within the fishery conservation zone. This interpretation severely restricts the federal regulatory scheme intended by Congress, negatively impacts federal/state relations in this area, and effectively limits the application of the Fishery Conservation and Management Act to the regulation of foreign vessels.

The Alaska supreme court interprets "registered under the laws of such state" in 16 U.S.C. § 1856(a) to include the purchase of an Alaskan fishing license and consequent state "registration" to fish. App. A at A-23. This issue of registration was not reached by the trial court because it based its order of dismissal upon exclusive federal court subject matter jurisdiction rather than whether the state possessed authority to regulate the F/V BARANOF as a state-registered vessel.

The supreme court applies a state, rather than a federal, definition of the word "registered" for purposes of the Fishery Conservation and Management Act, despite earlier federal authority recognizing the need for a federal definition. *See United States v. SEA FOAM II*, 528 F. Supp. 1133 (D. Alaska 1982). In effect, the court has approved the state's method of boot-strapping its regulatory authority to include all fishing in the fishery conservation zone by simply defining vessel registration under the Fishery Conservation and Management Act to include state fishing license registration. The Alaskan fishing regulations confirm the state's intent to extend its authority in this manner. *See Alaska Stat. § 16.05.475(c); Alaska Admin. Code, title 5., §§ 34.085, 39.120.*

This unsupported extension of the state regulatory fishing authority over all vessels fishing outside the Alaska territorial sea conflicts with both this Court's decision in *Skiriotes v. Florida*, 313 U.S. 69 (1941), that a state may regulate only the activities of its citizens upon the high seas, and the exclusive federal regulatory scheme as expressly provided in the Fishery Conservation and Management Act. Yet, in the case at bar, the state of Alaska seeks to regulate the activities of a vessel documented in the state of Washington and owned by a Washington limited partnership.

The construction by the Alaska supreme court of the term "registered" effectively removes any requirement that a state have a sovereign relationship over or a close nexus with the vessel it seeks to regulate beyond its political jurisdiction. Unfortunately, there is no indication of Congressional intent in including the phrase "registered under the laws of such state" in 16 U.S.C. § 1856(a) because the phrase was added during the bill's passage through the conference committee. Final resolution by this Court is necessary to settle this important question of federal law.

5. There Is an Improper Delegation of Authority.

The Secretary of Commerce and the North Pacific Fishery Management Council have abdicated their responsibility to regulate fishing in the Fishery Conservation Zone to the state of Alaska. The North Pacific Fishery Management Council did not prepare a Fishery Management Plan for king crab in the Bering Sea, Aleutian Islands Region, until March 1982, approximately five years after passage of the Fishery Conservation and Management Act, which directed development of Fishery Management Plans. The Secretary of Commerce has yet to approve or disapprove the plan.

More importantly, the king crab Fishery Management Plan does not rely on a detailed set of federal regulations but, instead, adopts all current and future Alaskan state regulations, subject to supersession by the Secretary of Commerce. In effect, the North Pacific Fishery Management Council and the Secretary of Commerce have delegated to the state of Alaska all regulatory authority, including enforcement authority, over fishing outside Alaskan waters, but within the fishery conservation zone. The Fishery Conservation and Management Act regulatory procedures thus have been wholly avoided except as to foreign fishing. This abdication of federal authority to the states runs contrary to Congressional intent to regulate fishing in the fishery conservation zone on a regional approach subject to limited state regulation of state registered vessels. 16 U.S.C. §§ 1851-1853.

Review by the Court is needed to prevent the state-by-state regulatory system rejected by Congress and to confirm the federal court jurisdiction and federal enforcement authority.

6. The Decision Is Contrary to Constitutional and Statutory Limitations on a State's Admiralty Jurisdiction.

The opinion of the Alaska supreme court ignores both precedent and applicable statutes and provides for virtually unlimited expansion of a state's admiralty jurisdiction under the savings to suitors clause. This case

originated with the state of Alaska filing a civil complaint, *in rem*, in its superior court seeking forfeiture of the F/V BARANOF pursuant to Alaska Stat. § 16.05.195. The vessel itself was the only named defendant. It is undisputed and agreed by all parties that the nature of the underlying action was an *in rem* admiralty proceeding.

The United States Constitution, art. III, § 2, extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." The statutory embodiment of the foregoing constitutional provision is contained in 28 U.S.C. § 1333. Admiralty jurisdiction is therefore exclusive in those maritime causes of action begun and carried on as proceedings *in rem*, i.e., where a vessel itself is treated as the offender and made the defendant by name or description. *Madruga v. Superior Court*, 346 U.S. 556 (1954); *The Moses Taylor v. Hammons*, 71 U.S. 422 (1866).

A state court, however, may consider admiralty matters under two theories: first, where the major proceeding is *in personam*, and the resulting *in personam* judgment affects interests in and to the ship or maritime object. In this case, the F/V BARANOF is the only named defendant in the forfeiture action. Thus, the first exception is not applicable. Second, under the "saving to suitors" clause of 28 U.S.C. § 1333(1), which has been interpreted as granting states concurrent admiralty jurisdiction in certain causes of action which were allowed the states, or their predecessor colonies, under the common law as of the year 1789. See Section 9 of the Judiciary Act of 1789, 1 Stat. 76-77.

The history of the states' forfeiture remedy was extensively covered by Chief Justice Stone in *C.J. Hendry Co. v. Moore*, 318 U.S. 125 (1942), and the accompanying dissent by Justice Black. Generally, there was judicial effort to restrict federal admiralty jurisdiction to the high seas and to exclude it from the more local harbors, estuaries, and arms of the sea. See, e.g., *C.J. Hendry Co.*, *supra*, 318 U.S. at 137, n.1.

Since fishing vessels are inanimate objects and incapable of cognitive wrongdoing, the states have, however, with the approval of this Court, extended *in personam* penal jurisdiction over "fishermen" onto the high seas, so long as there is no direct conflict with federal law. *Skiriotes v. Florida, supra*, 313 U.S. 69. Notwithstanding the expansion of a state's *in personam* penal jurisdictional rights for fisheries violations, there has been no corresponding expansion of the State's *in rem* admiralty jurisdiction.

By the Fishery Conservation and Management Act, exclusive *in rem* forfeiture jurisdiction (in admiralty) over fisheries violations in the fishery conservation zone has been reconfirmed in the United States district courts. 16 U.S.C. § 1860(b). Thus, a state court's *in rem* admiralty jurisdiction, for forfeiture, can now only be pursued if it was available to the state at common law. Yet, at common law, states and colonies exercised no admiralty jurisdiction over vessels on the high seas.

The opinion of the Alaska supreme court ignores this precedent and effectively provides for unlimited expansion of a state's alleged concurrent admiralty jurisdiction under the saving to suitors clause. By promulgating regulations or statutes which include a forfeiture remedy for violations, a state's concurrent admiralty jurisdiction will be assured regardless of where the alleged violation occurs.

Clearly, it is the United States, and not the states themselves, that must decide what extensions beyond the common law, if any, are to be allowed for a state's *in rem* admiralty jurisdiction. The ruling by the Alaska supreme court ignores that process and grants the state of Alaska a jurisdictional right where constitutionally, statutorily and historically it has none.

This Court has previously dealt with a similar problem in *The Hine v. Trevor*, 71 U.S. 555 (4 Wall 1866) and has refused to permit such an extension of a state's *in rem* jurisdiction. The Alaska supreme court, however, has extended the state's *in rem* admiralty jurisdiction by virtue of the bootstrap technique expressly disallowed in

The Hine. If the Alaska supreme court's position remains unaltered, the resulting proliferation of laws by the coastal states will not only impede the national maritime laws and commerce, but will be contrary to the Constitution and statutes vesting national admiralty law solely in the district courts and to the Congressional expression of that vesting in the Fishery Conservation and Management Act, 16 U.S.C. § 1861(d).

Certiorari should be granted to define the limits of a state's concurrent *in rem* admiralty jurisdiction after enactment of the Fishery Conservation and Management Act and to determine whether a forfeiture remedy against a vessel for alleged violations of state fishing laws, not only in the state's waters but on the high seas as well, will grant a state court concurrent *in rem* admiralty jurisdiction.

7. **The Claim of the Supreme Court of the State of Alaska of *In Rem* Admiralty Jurisdiction Is Inconsistent with and Contrary to the Exclusive Jurisdiction Granted Ship Mortgage Holders and Maritime Lienors.**

Immediately after the seizure of the F/V BARANOF, the state served notice of the forfeiture action on the holders of recorded preferred ship mortgages on the F/V BARANOF and obtained an order from the superior court calling for notice of the pending action by publication "to the world," thereby treating the forfeiture action no different than any *in rem* admiralty foreclosure action with the thought that the decree would be good "against the world" and extinguish all rights of secured parties in and to the vessel. *See State v. Rice*, 626 P.2d 104 (Alaska 1981).

The preferred ship mortgagees' mortgage rights were created by federal law. 46 U.S.C. §§ 911-984. Once the mortgages are in existence, the mortgage documents need not be surrendered "except in the case of a forfeiture of the vessel or at sale by the order of *any court of the United States*." 46 U.S.C. § 961(a) (emphasis added). Also, the interest of the preferred ship mortgage holders in a vessel of the United States, such as the F/V BARANOF, *see* 46

U.S.C. § 911(4), shall not be terminated by a forfeiture of the vessel for violation of any law of the United States unless the mortgagee authorized, consented or conspired to effect the illegal act, 46 U.S.C. § 961(b). Of course, Alaska's forfeiture statute, Alaska Stat. § 16.05.195, is not a law of the United States." U.S. Const., art. VI, cl. 2; *Bard v. The Silver Wave*, 98 F. Supp. 271 (D. Md. 1951).

The forced involvement of maritime lienors and the preferred ship mortgage holders, by the state's service of the notice of the forfeiture proceeding, results in an irreconcilable jurisdictional conflict. A preferred ship mortgage can be enforced only in a United States district court sitting in admiralty, 46 U.S.C. § 951. That right is not a concurrent right vested in the Alaska state courts; however, by virtue of the notice and purported impact of the *in rem* forfeiture decree by the state court, the mortgage holders have no choice but to appear. Such an appearance does not create any mortgage enforcement capability and the required remission procedure of *State v. Rice, supra*, 626 P.2d 104, does not yield a judgment or any other rights that are necessary adjuncts to enforcement of maritime mortgage or lien rights. In the event a vessel forfeiture results in a sale of the vessel, the mortgagees and maritime lienors lose a critical right, for the mortgage and maritime lien interests cannot be offset due to the Alaska court's jurisdictional inability to reduce the claims to judgment, *i.e.*, there cannot be a decision of a court of the United States to adjudicate the mortgage or maritime lien interests.

The Alaska superior court is not sitting as an admiralty court to adjudicate maritime or admiralty interests; rather, the essence of the proceeding is one of enforcing a state regulation in a state court proceeding. Assuming forfeitures for alleged wrongdoings on the high seas were remedies available to the colonies and states and, further, assuming that the state's forfeiture proceeding divests all interests of "the world" in the vessel, the question remains of how any state court can so rule, as an admiralty court, when the preferred ship mortgages and federal maritime

liens were not present at common law and were created by federal statute long after the creation of the exclusive admiralty jurisdiction in the federal courts.

Without review by and direction from this Court setting forth what concurrent enforcement rights the states have, if any, for preferred ship mortgages and maritime liens, the resulting decisions will completely undermine the exclusive federal enforcement jurisdiction for those maritime interests. More importantly, without limits on the states' alleged concurrent jurisdiction over these maritime interests, the concept of national admiralty jurisdiction, all within one judicial system, will be destroyed.

CONCLUSION

The Court should review this case because it presents significant, novel questions of federal jurisdiction and authority in the regulation of the United States fishery resource as well as the power of the federal district courts and the state courts, both in enforcement of fishery regulations under the Fishery Conservation and Management Act and in admiralty.

Respectfully submitted this
9th day of May, 1984.

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APPENDIX A

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA)	
)	
Appellant,)	
)	
vs.	)	FILE NO.
	)	7287
F/V BARANOF, its gear, paraphernalia, etc.; BARANOF)	
FISHERIES, a Washington Limited Partnership; RAINIER)	
NATIONAL BANK; RAINIER	)	<u>OPINION</u>
NATIONAL BANK, as Trustee for Universal Seafoods, Inc.,)	
)	
Appellees.)	
)	
F/V BARANOF, its gear, paraphernalia, etc.; BARANOF)	
FISHERIES, a Washington Limited Partnership, RAINIER)	
NATIONAL BANK; RAINIER	)	FILE NO.
NATIONAL BANK, as Trustee for Universal Seafoods, Inc.,	)	7324
)	
Cross-Appellants)	
)	
vs.	)	[No. 2785
	)	February
STATE OF ALASKA,	)	10, 1984]
)	
Cross-Appellee.)	

Appeal from the Superior Court of the
State of Alaska, Third Judicial District,
Kodiak, Daniel A. Moore, Jr., Judge

Appearances: Kathleen I. McGuire, Assistant Attorney General, Anchorage, Robert M. Maynard, Assistant Attorney General, Juneau, Norman C. Gorsuch, Attorney General, Juneau, for Appellant/Cross-Appellee. Terence P. Lukens, Karr, Tuttle, Koch, Campbell, Mawer & Morrow, Seattle, Washington and James M. Gorski, Hughes, Thorsness, Gantz, Powell, Brundin, Anchorage, for Appellees/CrossAppellants. Carol E. Dinkens, Assistant Attorney General, J. Vance Hughes, Donald A. Carr, and Leslie M. Madden, Attorneys, U.S. Department of Justice, and Margaret Frailey, National Oceanic and Atmospheric Administration, Washington, D.C., for The Secretary of Commerce as Amicus Curiae. R.H. Connell, Assistant Attorney General, Mary E. Hackenbracht, Deputy Attorney General, John K. Van Dekamp, Attorney General, San Francisco, California, for the State of California as Amicus Curiae.

Before: Burke, Chief Justice, Rabinowitz, Matthews, and Compton, Justices. [Moore, Justice, not participating]

This appeal is from an in rem forfeiture proceeding instituted by the State of Alaska against the F/V Baranof, a vessel used for the harvesting of king crab off the Alaska coast. The State alleged that

the Baranof exceeded its authorized catch limit under Alaska law, and was hence subject to forfeiture under AS 16.05.195.

The trial court, Judge Moore presiding, dismissed the State's suit, ruling that the Magnuson Fishery Conservation and Management Act (hereafter FCMA) pre-empted state regulation of king crab harvesting and provided for exclusive jurisdiction in the federal courts. The trial court ruled in favor of the State that: (1) federal admiralty jurisdiction was not exclusive for an in rem forfeiture action brought by the State for violation of state law; (2) federal jurisdiction was not exclusive based on the fact that a maritime lien created under federal law was attached to the Baranof; and (3) the Baranof's due process rights were not violated by the seizure of the vessel without a prior hearing. We reverse the trial court on the

issue of pre-emption and jurisdiction under the FCMA, and affirm on the remaining issues.

I. FACTS

The defendant, F/V Baranof, is a vessel owned by Baranof Fisheries, a Washington state limited partnership. The F/V Baranof is registered with the Coast Guard and has its home port in Seattle, Washington. The vessel is also registered in Alaska and has been issued an Alaska Department of Fish and Game vessel number. On May 9, 1981, officers of the Alaska State Division of Fish & Wildlife Protection seized the F/V Baranof in Dutch Harbor, Alaska under authority of a search and seizure warrant issued on May 7, 1981. On May 11, 1981, the State of Alaska filed a civil complaint in rem (the vessel itself being the only named defendant) in superior court for the forfeiture of the F/V Baranof pursuant to

AS 16.05.195, alleging unlawful harvest, transportation, and possession of king crab in 1979 and 1980. On May 12, 1981, the State filed a motion for publication of notice to owners and other interested parties, which was granted on May 14, 1981. Negotiations for release of the vessel were commenced immediately, and on May 27, 1981, the ship was released under a Special Release Agreement. It is undisputed that the alleged violations occurred in waters outside the three-mile limit of the Alaskan territorial sea.

On June 8, 1981, the F/V Baranof filed a petition to remove the case to the United States District Court for the District of Alaska. Baranof Fisheries appeared and claimed ownership through its general partner. Rainier National Bank also appeared and filed claims to the F/V Baranof as a preferred ship mortgage holder.

The defendant and claimants thereto (hereafter referred to jointly as the Baranof) raised the following arguments to support federal subject matter jurisdiction: diversity jurisdiction; the Fishery Conservation and Management Act (FCMA), 16 U.S.C. §§ 1801-1880, pre-empts coastal state regulation of fishing seaward of the three-mile territorial boundary of the state; the federal courts have exclusive admiralty jurisdiction of all in rem proceedings over documented United States vessels under the United States Constitution, Art. III, § 2, and under 28 U.S.C. § 1333; the Ship Mortgage Act, 46 U.S.C. §§ 911-984, creates exclusive federal jurisdiction over vessel forfeitures; and seizure of the defendant without a prior hearing violated the owners' fourteenth amendment due process rights.

The district court held on the merits that this case was not within the general admiralty jurisdiction of the federal courts, and that there was no diversity. The court further held that none of the other bases of federal subject matter jurisdiction asserted by the Baranof was sufficient. The Baranof's arguments in regard to the fourteenth amendment, FCMA pre-emption of state regulation and enforcement, and the Ship Mortgage Act were not evident from the face of the State's well-pleased complaint, rather they were interposed as defenses to state law claims. These arguments, therefore, were to be addressed in the state courts. The district court remanded the case to superior court on October 27, 1981.

On January 29, 1983, the Baranof filed a pre-answer motion to dismiss. The Baranof stated alternative arguments identical to those raised in its petition to

remove (except for dropping the claim of diversity jurisdiction), and also asserted that federal jurisdiction was exclusive under the FCMA. The trial court granted the motion to dismiss on the issues of pre-emption and jurisdiction under the FCMA,¹ but rejected the Baranof's other grounds. The State appealed and the Baranof cross-appealed.

1. Both parties stated in oral argument that the trial court did not rule on the pre-emption issue under the FCMA. We disagree. The trial court stated, "[d]efendant/claimant's motion to dismiss on the basis that the Fisheries Conservation and Management Act 16 U.S.C. § 1801 - et seq. preempts any State claim because the United States has exercised exclusive fishery management authority . . . is granted." Since this issue was decided below and has been briefed before this court (including amicus briefs filed by the United States Secretary of Commerce and the Attorney General of the State of California), we shall decide the matter on the merits.

II. THE FCMA

A. BACKGROUND

The Magnuson Fishery Conservation and Management Act (FCMA) was enacted in 1976 to protect the United States fishing industry and dependent coastal economies from the stresses caused by overfishing in the seas adjacent to territorial waters, particularly by foreign fishing fleets. 16 U.S.C. § 1801.² Consistent with this purpose, the FCMA established a fishery

2. For the legislative history of the FCMA, see Committee on Commerce, and National Ocean Policy Study, 94th Cong., 2d Sess., A Legislative History of the Fishery Conservation and Management Act of 1976. See also Magnuson, The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries, 52 Wash. L. Rev. 427 (1977).

conservation zone³ (FCZ) beyond the territorial sea, within which zone the United States would exercise fishery management authority and limit the access of foreign boats. 16 U.S.C. §§ 1811, 1812. Within the federal zone, Congress envisioned "[a] national program for the conservation and management of the fishery resources of the United States . . . to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources." 16 U.S.C. § 1801(a)(6).

3. The fishery conservation zone is defined in the FCMA as that area contiguous to the territorial sea, the outer boundary of which is 200 nautical miles from the baseline from which the territorial sea is measured. The inner boundary of this zone is a line conterminous with the seaward boundary of each coastal state. 16 U.S.C. § 1811.

The framework established by the Act to accomplish these purposes called first for the establishment, through cooperative action of the states and the federal government, of Regional Fishery Management Councils. 16 U.S.C. § 1852. Following their organization, the Councils were to develop fishery management plans with respect to those stocks of fish requiring conservation and management. Id. Approved plans were to be implemented and enforced by the Secretary of Commerce. 16 U.S.C. §§ 1854, 1855, 1861.

B. PRE-EMPTION

When Congress passes legislation authorized by its constitutional powers,⁴ conflicting state legislation may be preempted by the supremacy clause of the

4. There is no dispute that Congress validly passed the FCMA pursuant to its power under the commerce clause. U.S. Const. art I, § 8.

United State [sic] Constitution.⁵ J. Nowak, R. Rotunda & J. Young, Constitutional Law 267 (1978). Pre-emption of state law will occur when Congress evidences an intent to occupy an entire field, Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58, 55 L.Ed.2d 179, 188 (1978); Alaska Board of Fish and Game v. Thomas, 635 P.2d 1191, 1192 (Alaska 1981), or when state and federal laws are in actual conflict. Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972), aff'd 411 U.S. 624, 36 L.Ed.2d 547 (1973); F/V American Eagle v. State, 620 P.2d 617, 622 n.10 (Alaska 1980), appeal dismissed 454 U.S. 1130, 71 L.Ed.2d 284 (1981).

5. U.S. Const. art VI, cl. 2.

Since no federal king crab regulations have been promulgated under the FCMA, our inquiry is restricted to the question of whether Congress occupied the field of regulation of king crab fishing. In deciding this question, we must ascertain Congress' intent in passing the FCMA. "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Shaw v. Delta Airlines, Inc., ____ U.S. ____, 77 L.Ed.2d 490, 500 (1983). Further, pre-emption will be found only when the "clear and manifest purpose" of Congress was to occupy the field. Philadelphia v. New Jersey, 437 U.S. 617, 621 n.4, 57 L.Ed.2d 475, 479-80 n.4 (1978); Webster v. Bechtel, 621 P.2d 890, 898 (Alaska 1980).

1. Explicit Pre-emption

Prior to passage of the FCMA, it is clear that states could regulate fishing beyond their three mile territorial sea in the absence of conflicting federal law or undue impediment to interstate commerce.

See Skiriotes v. Florida, 313 U.S. 69, 85 L.Ed. 1193 (1941) (upholding direct state regulation of the fishing activity of its citizens beyond the territorial sea where state has legitimate interest in matter regulated). See also Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 80 L.Ed. 772 (1936) (upholding indirect state control of exploitation of fishery resources beyond territorial sea through law regulating possession, transportation, or disposition of fish landed within state where such landing law served state interest in preservation of resources in territorial sea); State v. Bundrant, 546 P.2d 530 (Alaska),

appeal dismissed sub nom. Uri v. Alaska,
428 U.S. 806 (1976) (Skiriotes extended to
permit direct state regulation of fishing
activity of non-citizens beyond the terri-
torial sea where non-citizen has suf-
ficiently close contacts with the state and
activity has potentially detrimental effect
upon resources in territorial sea).

Congress, in passing the FCMA, narrowed
state authority somewhat by providing that
federal management was exclusive outside
the three mile limit with one exception.
16 U.S.C. § 1812 provides that, "[t]he
United States shall exercise exclusive
fishery management authority, in the manner
provided for in this chapter, over . . .
(1) [a]ll fish within the fishery conser-
vation zone." 16 U.S.C. § 1856(a) provides
in relevant part that:

No state may directly or indirectly
regulate any fishing which is engaged
in by any fishing vessel outside its

boundaries, unless such vessel is registered under the laws of such State.

(Emphasis added). These provisions evidence a specific congressional decision to assert federal jurisdiction in the FCZ without fully occupying the field. Preserved to the states is the authority to regulate state registered vessels in the FCZ. The FCMA thus alters prior law in regard to the legitimate exercise of extra-territorial state jurisdiction by replacing the citizenship and close contacts tests with a registration requirement.

In summary, we cannot conclude that the FCMA on its face pre-empts all state extra-territorial regulation. Other courts which have considered this issue, at least when no federal regulations had been promulgated for the specific species of fish, have agreed. See Anderson Seafoods, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982)

(upholding state statute prohibiting use of purse seine within or without the waters of the state as applied to fisherman with vessel registered in state operating beyond state territorial boundary); People v. Weeren, 607 P.2d 1279 (Cal.), cert. denied, 449 U.S. 839, 66 L.Ed.2d 45 (1980) (upholding state assertion of penal jurisdiction in situation wherein defendant used state licensed vessel to take swordfish in FCZ in violation of state regulations and no federal regulatory plan for swordfish had been implemented); cf. State v. Sterling, 448 A.2d 785 (R.I. 1982) (FCMA pre-empts state regulation of commercial fishing for a particular species of fish where federal regulations governing such fishing have been promulgated).⁶

6. One Florida appellate court has held that the FCMA pre-empts all state regulation of fishing in the FCZ. Tingley

(Footnote Continued)

2. Implicit Pre-emption

Neither can we conclude that Congress implicitly pre-empted all state regulation in the FCZ. First, 16 U.S.C. § 1856(a) specifically allows regulation of state registered vessels. Thus, cases holding that the very delegation of regulatory power to an administrative agency supersedes state regulation, even in the absence or the failure of the federal agency to fully exercise its authority,⁷ are distinguishable and inapposite.

(Footnote Continued)

v. Allen, 397 So.2d 1166 (Fla. App. 1981). However, another Florida appellate court has subsequently rejected this holding. State v. Southeastern Fisheries Ass'n, 415 So.2d 1326, 1329 (Fla. App. 1982). See also Anderson Seafoods, 529 F.Supp. at 514 (rejecting Tingley).

7. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 55 L.Ed.2d 179 (1978); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 91 L.Ed. 1234 (1947).

Second, a holding that the FCMA pre-empted all state regulation in the FCZ even in the absence of the promulgation of federal regulations would frustrate the primary purpose of the FCMA, which is to provide proper management to ensure the fisheries are not depleted. The process of instituting federal regulation under the FCMA is extensive and lengthy.⁸ It is

8. Fishery management plans must contain: an extensive biological, economic, historical, and operational description of the fishery to be regulated, 16 U.S.C. § 1853(a)(2); an assessment of the present and probable future biologic condition of the fishery, and the maximum sustainable yield and "optimum yield" to be derived therefrom, 16 U.S.C. § 1853(a)(3); and further assessments relating to foreign participation in the fishery, 16 U.S.C. § 1853(a)(4). All of these assessments are required to be based on the best scientific information which can be gathered. 16 U.S.C. §§ 1851(a)(2), 1852(g)(1). The plans are developed by the Regional Fishery Management Councils established by the FCMA with the participation of "all interested

(Footnote Continued)

difficult to believe that Congress contemplated pre-empting state efforts to conserve fishing resources in the interval between passage of the Act and adoption of federal regulations covering a specific species of fish.⁹ A contrary conclusion

(Footnote Continued)

persons" through public hearings. 16 U.S.C. § 1852(h)(3). Once approved by a Regional Council, a fishery management plan is submitted to the Secretary of Commerce for review and for public comment on proposed regulations, 16 U.S.C. §§ 1854(a) and (b), after which the Secretary may approve the plan or disapprove it in whole or in part. Id. Where the Secretary finds a plan to be consistent with the national standards established by the FCMA the plan will be implemented by final regulations. 16 U.S.C. § 1855.

9. The FCMA does authorize the Secretary of Commerce to promulgate emergency regulations even in the absence of a federal fishery management plan. 16 U.S.C. § 1855(e). However, these emergency regulations can remain in effect for only forty-five days (with one forty-five day extension available). Id. The short term nature of this provision indicates it was not meant to be utilized to comprehensively regulate the fisheries during the lengthy period from the passage of the Act until adoption of federal regulations.

would conflict with the Act's stated purposes.

Third, the North Pacific Fishery Management Council has prepared a fishery management plan and proposed federal regulations for king crab fishing in waters outside the Alaskan territorial sea. The Secretary of Commerce currently is reviewing the plan. Under the proposed plan, the fishery will be governed by federal standards which wholly incorporate the Alaskan state regulations. If approved by the Secretary, the incorporated Alaskan regulations will become the federal regulatory scheme. This negates any inference that the Council has decided that regulation of the king crab fishery in the FCZ outside Alaskan water is unnecessary. Furthermore, it is strong evidence that the Alaskan regulatory regime does not stand as an

obstacle to the accomplishment and execution of the purpose of the FCMA.

Fourth, the Secretary of Commerce, the federal official charged with implementing the FCMA, has filed an amicus brief urging us to hold that the Act does not pre-empt state regulation of king crab. This interpretation by the agency responsible for the FCMA's administration is entitled to considerable weight. Udall v. Tallman, 38 U.S. 1, 4, 13 L.Ed.2d 616, 619 (1965); United States v. RCA Alaska Communications, Inc., 597 P.2d 489, 498 (Alaska 1979). Thus, we conclude that the FCMA did not pre-empt Alaskan king crab regulation of vessels registered in Alaska.

3. Registration

State regulation is only allowed outside the three mile state territorial sea if the vessel to be regulated "is registered under the laws of such state."

16 U.S.C. § 1856(a). The Baranof contends that this registration provision is confined to the federal registration requirements applicable when the FCMA was enacted. See 46 U.S.C. § 17 (repealed Dec. 24, 1980). Under this interpretation, the F/V Baranof was registered only in the State of Washington. We disagree.

We believe the plain meaning of the language, "under the laws of such state" is to give effect to state registration laws.¹⁰ A contrary interpretation would render this language meaningless and thus violate a cardinal principle of statutory construction. 2A C. Sands, Sutherland Statutory Construction § 46.06, at 63 (4th ed. 1973). See also United States v. Menasche, 348 U.S. 528, 538-39, 99 L.Ed. 615, 624 (1954).

10. The F/V Baranof was registered in Alaska under AS 16.05.475, AS 16.05.520, AS 16.05.530, 5 AAC 39.120, and 5 ACC 34.020.

The Baranof's interpretation also would severely restrict a state's authority to regulate fishing off its waters. The Act's express recognition of extraterritorial jurisdiction would be virtually meaningless. The California Supreme Court in People v. Weeren rejected a similarly narrow interpretation of "registration." The court found significance in the fact that:

[B]ecause the federal government has developed no swordfish regulations, the exclusion of any such state regulation would create the danger of wholly unregulated exploitation of that species in coastal waters and on the high seas, thus resulting in the possibility of substantial or, indeed, total depletion of an important natural resource. Had Congress intended by its successive enactments such a drastic curtailment of the states' Skiriotes jurisdiction, it would have said so. On the contrary, though undoubtedly aware of various state fishing "registration" schemes such as California's, Congress avoided all reference to the long established terms of art in the federal documentation laws, and pre-mised continued state jurisdiction on the undefined and generic concept of local "registration."

607 P.2d at 1286. Thus we conclude the F/V Baranof was registered under Alaska law as required by 16 U.S.C. § 1856(a).¹¹

C. JURISDICTION

Assuming that a coastal state does have limited regulatory authority in the FCZ, the Baranof asserts that the FCMA provides the federal courts exclusive jurisdiction to enforce this authority. We see no merit in this claim.

The FCMA grants the federal district courts "exclusive jurisdiction over any case or controversy arising under the provisions of this chapter." 16 U.S.C. § 1861(d).¹² Thus, the issue is whether this

11. Further, the Secretary of Commerce supports this interpretation.

12. 16 U.S.C. § 1861(e) provides that:

For purposes of this section—
(1) The term "provision of this chapter" includes (A) any regulation or

(Footnote Continued)

case "arises under" the FCMA. Furthermore, statutes conferring exclusive jurisdiction on the federal district courts are to be strictly construed, and state court jurisdiction is not to be defeated by implication. See Healy v. Ratta, 292 U.S. 263, 78 L.Ed. 1248 (1934); Galveston, H. & S.A.R. Co. v. Wallace, 223 U.S. 481, 56 L.Ed. 523 (1912).

We believe it is self-evident that the present action "arises under" Alaska state law, rather than the FCMA. "[S]ince 1887 it has been settled law that a case may not

(Footnote Continued)

permit issued pursuant to this chapter, and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 1821(b) or (c) of this title, with respect to fishing subject to the exclusive fishery management authority of the United States.

'be removed [because it does not "arise under" federal law] to federal court on the basis of federal defense, including the defense of preemption. . . ." Franchise Tax Board v. Laborers Vacation Trust,

U.S. ___, 77 L.Ed.2d 420, 433 (1983).¹³

While the FCMA might have constituted a defense, the Baranof was charged in the complaint with violation of Alaska law. Thus, this case did not "arise under" the FCMA.

The Baranof attempts to counter this conclusion by arguing that Congress in the FCMA, by two distinct steps: first, voided

13. Precedent as to when a suit "arises under" federal law for purposes of original and removal jurisdiction is interchangeable. 1A J. Moore, Federal Practice, § 0.160[5], at 238 (1983). The same analysis of "arising under" is utilized for the purpose of determining if original federal jurisdiction is exclusive. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 6 L.Ed.2d 584 (1961).

the states' Skiriotes regulatory authority in 46 U.S.C. 1812; and second, restored some state authority in 46 U.S.C. 1856(a). The argument is that Alaska king crab regulatory authority was granted by the FCMA, and thus "arises under" the FCMA.

Even if we were to decide that Congress voided and then restored state power, rather than the more logical interpretation that Congress simply narrowed existing state authority, the Baranof's argument is without merit. The United States Supreme Court has stated:

How and when a case arises "under the Constitution or laws of the United States" has been much considered . . . To bring a case within the [removal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. Starin v. New York, 115 U.S. 248, 257, 29 L.Ed. 388, 390, 6 S.Ct. 28; First Nat. Bank v. Williams, 252 U.S. 504, 512, 64 L.Ed. 690, 692, 40 S.Ct. 372. The right or immunity must be such that it will be supported if the Constitution or laws of the

United States are given one construction or effect, and defeated if they receive another. Ibid.

. . . .

The argument for the respondent proceeds on the assumption that because permission at times is preliminary to action the two are to be classed as one. But the assumption will not stand. . . . We recur to the test announced in Puerto Rico v. Russell & Co., 288 U.S. 476, 77 L.Ed. 903, 53 S.Ct. 447, supra: "The federal nature of the right to be established is decisive--not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 53 L.Ed. 126, 29 S.Ct. 42, supra. With no greater reason can it be said to arise thereunder because permitted thereby.

Gully v. First National Bank, 299 U.S. 109, 112, 116, 81 L.Ed. 70, 72, 74 (1936).¹⁴

14. The Supreme Court has also recognized that federal jurisdiction over the
(Footnote Continued)

Further, courts have considered pragmatic concerns, such as the caseload of the federal judiciary and the extent of the necessity for an expert federal tribunal to handle issues of federal law, in determining [sic] whether an action arises under federal law. See Town of Greenhorn v. Baker County, Oregon, 596 F.2d 349, 353 (9th Cir. 1979); League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072, 1074 (9th Cir. 1976). These practical concerns militate against imposition of a new class of fishery cases upon the federal district courts, where state courts have traditionally interpreted and applied state law.

(Footnote Continued)

location of an event giving rise to a federal cause of action does not restrict a state's jurisdiction over the action where concurrent jurisdiction is otherwise proper. Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 481-82, 69 L.Ed.2d 784, 793-94 (1981).

III. ADMIRALTY JURISDICTION

Article 3, § 2 of the United States Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." The Baranof contends that federal jurisdiction of admiralty cases is exclusive as to in rem proceedings.¹⁵

28 U.S.C. § 1333, the statutory embodiment of U.S. Const. art. 3, § 2, provides

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Thus, the federal courts have exclusive jurisdiction to all cases which do not fit the "saving to suitors" exception. This exception has been interpreted as giving states concurrent admiralty jurisdiction to

15. Both parties agree that this case is an in rem admiralty proceeding.

those causes of action which were allowed under the common law as of 1789, when the predecessor of 28 U.S.C. § 1333 went into effect.¹⁶ See C.J. Hendry Co. v. Moore, 318 U.S. 133, 134, 87 L.Ed. 663, 664 (1943); The Moses Taylor v. Hammons, 71 U.S. (4 Wall.) 411, 430, 18 L.Ed. 397, 402 (1867). In rem admiralty cases between private parties were not allowed at common

16. Article 3, § 2 of the United States Constitution was originally implemented by the Judiciary Act of 1789, 1 Stat. 76-77. Section 9 of that Act provided in part:

[T]he district courts . . . shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; . . .

Although the wording of 28 U.S.C. § 1333 is different, the substance of the provision is the same. Madruga v. Superior Court, 346 U.S. 556, 560 n.12, 98 L.Ed. 290, 296 n.12 (1954).

law, and thus such actions do not fit under the "saving to suitors" clause and must be litigated in federal court. Madruga v. Superior Court, 346 U.S. 556, 560, 98 L.Ed. 290, 296 (1954); Hendry, 318 U.S. at 137, 87 L.Ed. at 666; The Moses Taylor, 71 U.S. (4 Wall.) at 430, 18 L.Ed. at 402.

However, in rem forfeiture actions brought by the Crown to enforce violations of law were allowed at common law. See Hendry, 318 U.S. at 137-153, 87 L.Ed. at 666-675; Smith v. Maryland, 59 U.S. (18 How.) 71, 76, 15 L.Ed. 269, 271-72 (1855). Accord 1 E. Jhrad, A. Sann & B. Chase, Benedict on Admiralty § 124, at 8-13 (7th ed. 1983). Thus, the United States Supreme Court has allowed concurrent state jurisdiction under the "savings to suitors" clause for state forfeiture proceedings. Id. In conclusion, the present case fits

under the "saving to suitors" clause and hence state jurisdiction is proper.¹⁷

17. The Baranof asserts that the holding in Hendry should be limited to when the forfeiture action is based on a violation of state law within the state territorial sea. While the violation in Hendry was within the three mile limit, there is nothing in the opinion which limits the holding to these facts. We believe the question of whether states have regulatory authority outside their territorial sea is a separate issue; one that has been answered affirmatively by the Skiriotes, Bayside Fish, and Bundrant cases cited supra.

The district court agreed with this conclusion in its decision denying the Baranof's petition for removal and remanding this case to state court. It said:

Regardless of the location of the Baranof's seizure or even of the violations upon which the seizure was based, I do not believe the rule of Hendry should be restricted to cases where the seizure takes place within the navigable waters of the state. The reasoning in Hendry is based upon the authority of the states as successors to certain sovereign powers of the original colonies. While this authority is at its most absolute within the three-mile limit of the states' territorial waters, it also extends beyond that limit as long as it does not come into conflict with federal legislation.

IV. JURISDICTION UNDER THE SHIP MORTGAGE ACT OF 1920

The Baranof contends that, because a forfeiture decree works in rem and thus will impact on preferred ship mortgage holders and other maritime lienors, the Ship Mortgage Act of 1920, 46 U.S.C. §§ 911-984, divests state courts of jurisdiction over vessel forfeitures where such an interest is involved. It is clear that a forfeiture decree extinguishes the rights of secured parties in and to the res, subject to remission in the case of innocent, non-negligent claimants. State v. Rice, 626 P.2d 104, 114 (Alaska 1981). However, we do not agree that the Ship Mortgage Act of 1920 provides for exclusive federal jurisdiction in an in rem forfeiture proceeding [sic] instituted by a state.

The Ship Mortgage Act of 1920 was enacted to ensure mortgagees a forum for their vessel forfeiture suits. The Act was

in response to the Supreme Court's ruling in Bogart v. The Steamboat John Jay, 58 U.S. (17 How.) 399, 15 L.Ed. 95 (1854) which held that "a mortgage on a ship . . . was not within the admiralty jurisdiction and, thus, the mortgagee could not bring suit in admiralty, either in personam on the debt or in rem to foreclose his security interest in the ship." Port Welcome Cruises, Inc. v. S.S. Bay Belle, 215 F.Supp. 72, 78 (D. Md. 1963). The Ship Mortgage Act of 1920 remedied this situation by providing:

[A] preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively.

46 U.S.C. § 951. If the present proceeding was a foreclosure action, federal jurisdiction would be exclusive. However, the state has brought a forfeiture action against the F/V Baranof. Thus, 46 U.S.C. § 951 does not apply.

Further, Madruga v. Superior Court, 346 U.S. at 561-62, 98 L.Ed. at 296-97 states that federal laws dealing with mortgages of vessels do not bar state jurisdiction where it is otherwise valid; in the present case, by the rule of Hendry.¹⁸ The federal rules dealing with

18. Madruga, 346 U.S. at 560, 98 L.Ed. at 296 does state that, "[a]dmiralty's jurisdiction is 'exclusive' only as to those maritime causes of action . . . in rem, . . . where a vessel . . . is itself treated as the offender . . . in order to enforce a lien." However, as noted above, this general rule does not apply to state forfeiture actions, where Hendry authorizes concurrent state jurisdiction.

priorities of lien holders bind the state courts, but jurisdiction is concurrent. Madruga, 346 U.S. at 561, 98 L.Ed. at 296.

V. PROCEDURAL DUE PROCESS

The Baranof's final contention is that its due process rights under the United States and Alaska constitutions were violated. It argues that the forfeiture statute under which the vessel was seized, AS 16.05.195, is constitutionally defective in that it does not provide a hearing either prior to or immediately after the seizure of property.¹⁹ Since we hold that

19. The State argues that the Baranof's challenge to the constitutionality of the forfeiture statute is not properly before this court because the Baranof raised this challenge under Civil Rule 12(b)(6) even though the State's complaint did allege wrongdoing warranting forfeiture, and the legality of the seizure process is not an issue in the complaint. Although technically correct, it seems that this issue could properly be raised in an in rem action by motion under 12(b)(2) prior to the Baranof's answer. The issue is treated as properly before the court.

the owners of the Baranof were in fact afforded procedural due process, we need not reach the question of the constitutionality of AS 16.05.195. See Jennings v. Mahoney, 404 U.S. 25, 30 L.Ed.2d 146 (1971); F/V American Eagle v. State, 620 P.2d 657, 667 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 71 L.Ed.2d 284 (1981).

Due process does not require notice or a hearing prior to seizure by government officials of property allegedly used in an illicit activity. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L.Ed.2d 452 (1974); American Eagle, 620 P.2d at 666.

However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco, 557 F.2d 1388 (9th Cir. 1977); Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976).

American Eagle, 620 P.2d at 666-67.

We believe the present case is analogous to American Eagle, 620 P.2d at 666-668, where we upheld the seizure of a king crab fishing vessel. As in American Eagle, the seizure of the Baranof was authorized by a judicially approved warrant issued upon probable cause pursuant to Criminal Rule 37. Id. at 667. The owners had "an immediate and unqualified right to contest the state's justification for the seizure under Criminal Rule 37(c)." Id.²⁰

20. Criminal Rule 37(c) provides:

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

"Rather than avail themselves of this opportunity, the owners negotiated the release of the vessel. . . ." Id.

Finally, in the present case, the State filed a civil complaint on the next working day following the seizure, and the owners were promptly notified.

For the reasons given above, we REVERSE the superior court on the issues of pre-emption and jurisdiction under the FCMA, AFFIRM the trial court on the remaining issues, and REMAND for trial.

APPENDIX B

IN THE TRIAL COURTS FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA)
Plaintiff,)
vs.)
F/V BARANOF, its paraphernalia,)
gear, etc.,)
Defendant,)
and)
RAINIER NATIONAL BANK, RAINIER)
NATIONAL BANK, Trustee for)
Universal Seafoods, Ltd.,)
BARANOF FISHERIES, a Washington)
Limited Partnership, by Ray Mar,)
Inc., BLACK INK, INC.,)
Claimants.)

Case No. 3K0-81-219 CI

DECISION ON DEFENDANT/CLAIMANT'S MOTION TO DISMISS

The court having fully reviewed the pleadings on file, exhibits and statutory and case authorities cited by the respective parties, herein renders the following decision:

1. Defendant/claimant's motion to dismiss on the basis that the State's action was brought In Rem against the vessel and that admiralty jurisdiction requires that said action be brought in the federal court is denied.

2. Defendant/claimant's motion to dismiss this action on the basis that the federal court has exclusive jurisdiction because of the involvement of a preferred ship mortgage is denied.

3. Defendant/claimant's motion to dismiss on the basis that the seizure of the vessel F/V BARANOF under the state forfeiture statute is unconstitutional is not decided by this court since the issue is moot under the facts of this case.

4. Defendant/claimant's motion to dismiss on the basis that the Fisheries Conservation and Management Act 16 U.S.C. §

1801- et seq. preempts any State claim because the United States has exercised exclusive fishery management authority and the United States District Court is the proper forum to exercise jurisdiction under the facts of this incident is granted.

The reasons for the court's decision noted above are set forth on the record, Tape Number 3ANM1607, Log Numbers 0189-0572. A cassette of this tape recording is enclosed.

Counsel for defendant/claimant shall prepare an appropriate judgment of dismissal in conformity with this court's decision within the next ten days.

DATED: August 17, 1982

s/s

DANIEL A. MOORE, JR.
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE
OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA)
Plaintiff,)
vs.)
F/V BARANOF, its paraphernalia,)
gear, etc.,)
Defendant,)
and)
RAINIER NATIONAK BANK, RAINIER)
NATIONAL BANK, Trustee for)
Universal Seafoods, Ltd.,)
BARANOF FISHERIES, a Washington)
Limited Partnership, by Ray Mar,)
Inc., BLACK INK, INC.,)
Claimants.)

3KO-81-219 CI

JUDGEMENT OF DISMISSAL

This matter having come before the court on the motion of defendant F/V Baranof and claimants, Rainier Natinal [sic] Bank, Rainier National Bank, Trustee

for Universal Seafoods, Ltd., Baranof Fisheries, a Washington Limited Partnership, by Ray Mar, Inc., seeking dismissal of the above captioned matter pursuant to Rule 12(b) of the Alaska Rules of Civil Procedure; and

The court being fully advised and having considered the oral argument of counsel;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the State of Alaska's complaint against the defendant F/V Baranof be and the same hereby is dismissed without prejudice.

DATED this _____ day of August, 1982, at
Anchorage, Alaska.

Superior Court Judge

APPROVED AS TO FORM,
SUBSTANCE AND FOR ENTRY:

WILSON L. CONDON
ATTORNEY GENERAL
STATE OF ALASKA

Dated: Aug. 31, 1982

By: s/s
John G. Gissberg
Assistant Attorney General

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN
and
KARR, TUTTLE, KOCH, CAMPBELL,
MAWER & MORROW

Attorneys for the F/V Baranof,
Rainier National Bank, Rainier
National Bank, Trustee for
Universal Seafoods, Ltd.,
Baranof Fisheries, a Washington
Limited Partnership, by
Ray Mar, Inc.

By: _____ Dated: _____
James M. Gorski

BRADBURY, BLISS & RIORDAN, INC.
Attorneys for Black Ink, Inc.

By: _____ Dated: _____
Michael Woodell

APPENDIX C

[FILED OCT 27, 1981
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By s/s Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,)
)
Plaintiff,)
)
v.	) NO. A 81-300
	) Civil
F/V BARANOF, its parapher-)
nalia, gear, etc.,)
)
Defendant.	) <u>MEMORANDUM</u>
	) <u>AND ORDER</u>

On May 9, 1981 the F/V BARANOF was seized in Bristol Bay by the State of Alaska for alleged fishing violations. A complaint of foreclosure was subsequently filed by the state in superior court and removed to this court by the BARANOF. The matter now comes here on a motion to remand.

Removal is proper only when the action could originally have been brought in federal district court. 28 U.S.C. 1441(a).

In particular, the removal petition must allege a sufficient basis for federal subject matter jurisdiction. The BARANOF alleges five bases of subject matter jurisdiction: diversity of citizenship; the Fourteenth Amendment to the United States Constitution; the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§1801-1882; the Ship Mortgage Act of 1920, 16 U.S.C. 1861(d); and the general admiralty jurisdiction of the federal courts, 28 U.S.C. 1331(l).

A. Diversity of citizenship: At the time of its seizure the BARANOF was owned by a limited partnership none of whose partners were citizens of Alaska. The BARANOF itself, however, is registered in Alaska. The defendants claim that the true citizenship of the BARANOF is that of the partners and that complete diversity between the

parties is present. Regardless of the merits of this claim, diversity jurisdiction under 28 U.S.C. 1332(a)(1) exists only between citizens of different states. Since a state is not a citizen of any state for diversity purposes, there is no basis for diversity jurisdiction here. Moor v. County of Alameda, 411 U.S. 693, 717 (1973).

B. The Fourteenth Amendment: The defendants also claim that their due process rights as outlined in Alyeska Pipeline Service Company v. the Vessel Bay Ridge, 509 F.Supp. 1115 (D. Alaska), have been violated by the state's seizing the BARANOF without a prior hearing. Jurisdiction for removal purposes, however, must be ascertainable from the face of the plaintiff's complaint and cannot be based on defenses raised in the answer, on counterclaims, or on third party claims. Gully v. First

National Bank in Meridian, 299 U.S. 109, 113 (1936); Rath Packing v. Becker, 530 F.2d 1295, 1303 (9th Cir. 1975). Since defendant's rights under the fourteenth amendment are here interposed only by way of defense to the forfeiture, they are not a sufficient basis for removal jurisdiction.

C. The Fishery Conservation and Management Act: The power of a state or regulate fishing even beyond the three mile limits of its territorial waters is well established. The states are free to exercise such authority over their own citizens as long as their actions do not conflict with federal legislation. Skiriotes v. Florida, 313 U.S. 69, 78 (1941). The BARANOF'S claim is, in essence, that FCMA has preempted the state of Alaska's regulation of fishing in the areas involved in this suit. Preemption however, is a matter of

defense to state law claims and not a grounds for federal removal. State of Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972). The effect of FCMA on the present action is therefore a question that must be addressed to the courts of the state of Alaska.

D. The Ship Mortgage Act of 1920: This act places exclusive jurisdiction over suits to foreclose preferred ship mortgages in the district courts of the United States. 46 U.S.C. §951. The state of Alaska is seeking a forfeiture, however, not the foreclosure of a mortgage. Its actions, therefore, need not be brought in this court. The BARANOF argues that since forfeiture works in rem, the State of Alaska's success in working the present forfeiture would invariably affect the rights of holders of liens against the

ship including the rights of holders of preferred ship mortgages. The existence of these other claims is immaterial to the present action however. As explained above, removal jurisdiction cannot be predicated upon the existence of federal claims in answers or in counterclaims, but must be evident from the face of the original complaint. 299 U.S. at 113; 530 F.2d at 1303. I, therefore, conclude that the Ship Mortgage Act does not provide a basis for removing this suit.

E. General Admiralty Jurisdiction: The most complex of defendant's jurisdictional claims is that removal may be predicated on the general admiralty jurisdiction of the federal courts. The United States district courts have original and exclusive jurisdiction over "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which

they are otherwise entitled." 28 U.S.C. 1331(l). While the question of what constitutes a civil case of admiralty or maritime jurisdiction is quite complex, the general rule is that actions in rem against vessels, of which forfeiture actions are a type, belong to the admiralty jurisdiction.

C.J. Hendry v. Moore, 318 U.S. 133, 136-37 (1943). The "saving to suitors" clause of this section, however, not only allows jurisdiction over certain actions to lie in the state courts, but precludes removal to the federal courts of any case that falls within its terms. Romero v. International Terminal Operating Company, 358 U.S. 354, 363 (1959); Harbor Boating Club v. Red Star Towing and Transportation Company, 179 F.Supp. 755, 756-57 (E.D.N.Y. 1960). The question to be decided, therefore, is whether or not the present action lies

within the saving to suitors clause of Section 1331.

The Supreme Court has held that the saving to suitors clause allows the states to provide a remedy in rem "in forfeiture cases where the articles are seized upon navigable water of the state for violation of state law." C.J. Hendry v. Moore, 318 U.S. at 153. On its face, this language would seem to include the seizure of the BARANOF. The parties are apparently agreed, however, that the seizure [sic] of the BARANOF did not occur on the navigable waters of the State of Alaska, but outside the three-mile limit of Alaska's territorial waters. Regardless of the location of the BARANOF'S seizure or even of the violations upon which the seizure was based, I do not believe that the rule of Hendry should be restricted to cases where

the seizure takes place within the navigable waters of the state. The reasoning in Hendry is based upon the authority of the states as successors to certain sovereign powers of the original colonies. While this authority is at its most absolute within the three-mile limit of the states' territorial waters, it also extends beyond that limit as long as it does not come into conflict with federal legislation. Skiriotes v. Florida, 313 U.S. 69, 76-77 (1941). The defendant may be able to show that the Fishery Conservation and Management Act conflicts with state regulations and preempts the State of Alaska's enforcement authority in this case. If this is so, the state court will be ousted of its jurisdiction and the case against the BARANOF will have to be dismissed. As noted above, however, this defense of pre-emption is one that must be addressed to

the state courts. State of Washington v.
American League of Professional Baseball
Clubs, 460 F.2d 654, 660 (9th Cir. 1972).
Based entirely on the allegations of the
complaint, this forfeiture action falls
squarely within the ambit of the saving to
suitors clause and well within the juris-
diction of the state courts. I, therefore,
remand this case to the Superior Court for
the Third Judicial District of Alaska for
all further proceedings.

ORDERED ACCORDINGLY.

DATED at Anchorage, Alaska, this 27th
day of October, 1981.

s/s

JAMES M. FITZGERALD
United States District Judge

cc: Gissberg
Gorski
Woodell
Clerk, Superior Court

APPENDIX D

Article III, Section 2

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article IV, Section 2

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

APPENDIX E

Magnuson Fishery Conservation and Management Act of 1976

16 U.S.C. § 1801: Findings, purposes and policy.

(a) Findings. -- The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged

by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United

States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes. -- It is therefore declared to be the purposes of the Congress in this chapter -

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf Fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development.

(c) Policy. -- It is further declared to be the policy of the Congress in this chapter --

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, as the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

Pub.L. 94-265 § 2, Apr. 13, 1976, 90 Stat. 331, amended Pub.L. 95-354, § 2, Aug. 28, 1978, 92 Stat. 519; Pub.L. 95-561, Title II, § 233, Dec. 22, 1980, 94 Stat. 3299.

16 U.S.C. § 1811. Fishery conservation zone.

There is established a zone contiguous to the territorial sea of the United States

to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

Pub.L. 94-265, Title I, § 101, Apr. 13, 1976, 90 Stat. 336.

16 U.S.C. § 1812. Exclusive fishery management authority.

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

Pub.L. 94-265, Title I, § 102, Apr. 13, 1976, 90 Stat. 336.

16 U.S.C. § 1851: National standards for fishery conservation and management.

(a) In general. -- Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) Guidelines. -- The Secretary shall establish guidelines, based on the national standards, to assist in the development of fishery management plans.

Pub.L. 94-256, Title III § 301, Apr. 13, 1976, 90 Stat. 346 (amended 1983).

16 U.S.C. § 1852: Regional fishery management councils.

(a) Establishment. --There shall be established, within 120 days after April 13, 1976, eight Regional Fishery Management Councils, as follows:

(1) New England Council. -- The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority over the fisheries in the Atlantic Ocean seaward of such States.

The New England Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(2) Mid-Atlantic Council. -- The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The Mid-Atlantic Council shall have 19 voting members, including 12 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(3) South Atlantic Council. --The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(4) Caribbean Council. -- The Caribbean Fishery Management Council shall consist of the Virgin Islands and the Commonwealth of Puerto Rico and shall have authority over the fisheries in the Caribbean Sea and Atlantic Ocean

seaward of such States. The Caribbean Council shall have 7 voting members, including 4 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(5) Gulf Council. -- The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States. The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(6) Pacific Council. -- The Pacific Fishery Management Council shall consist of the States of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(7) North Pacific Council. -- The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The

North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington).

(8) Western Pacific Council. --The Western Pacific Fishery Management Council shall consist of the State of Hawaii, American Samoa, and Guam and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Western Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority.

(b) Voting members. -- (1) The voting members of each Council shall be:

(A) The principle State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his

designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary shall be appointed by the Secretary from a list of qualified individuals submitted by the Governor of each applicable constituent State. With respect to the initial such appointments, such Governors shall submit such lists to the Secretary as soon as practicable, not later than 45 days after April 13, 1976. As used in this subparagraph, (i) the term "list of qualified individuals" shall include the names (including pertinent biographical data) of not less than three such individuals for each applicable vacancy and (ii) the term "qualified individual" means an individual who is knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources of the geographical area concerned.

(2) Each voting member appointed to a Council pursuant to paragraph (1)(C) shall serve for a term of 3 years; except that, with respect to the members initially so appointed, the Secretary shall designate up to one-third thereof to serve for a term of 1 year, up to one-third thereof to serve for a period of 2 years, and the remaining such members to serve for a term of 3 years.

(3) Successors to the voting members of any Council shall be appointed in the same manner as the original voting members. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(c) Nonvoting members. -- (1) the non-voting members of each Council shall be:

(A) The regional or area director of the United States Fish and Wildlife Service for the geographical area concerned, or his designee.

(B) The commander of the Coast Guard district for the geographical area concerned, or his designee; except that, if two Coast Guard districts are within such geographical area, the commander designated for such purpose by the commandant of the Coast Guard.

(C) The executive director of the Marine Fisheries Commission for the geographical area concerned, if any, or his designee.

(D) One representative of the Department of State designated for such purpose by the Secretary of State, or his designee.

(2) The Pacific Council shall have one additional nonvoting member who shall be appointed by, and serve at the pleasure of, the Governor of Alaska.

(d) Compensation and expenses. --The voting members of each Council, who are not employed by the Federal Government or any State or local government, shall receive compensation at the daily rate for GS-18 of the General Schedule when engaged in the actual performance of duties for such Council. The voting members of each Council, any nonvoting member described in subsection (c)(1)(C) of this section, and the nonvoting member appointed pursuant to subsection (c)(2) of this section shall be reimbursed for actual expenses incurred in the performance of such duties, and other nonvoting members may be reimbursed for actual expenses.

(e) Transaction of business. --

(1) A majority of the voting members of any Council shall constitute a quorum, but one or more such members designated by the Council may hold hearings. All decisions of any Council shall be by majority vote of the voting members present and voting.

(2) The voting members of each Council shall select a Chairman for such Council from among the voting members.

(3) Each Council shall meet in the geographical area concerned at the call of the Chairman or upon the request of a majority of its voting members.

(4) If any voting member of a Council disagrees with respect to any matter which is transmitted to the Secretary by such Council, such member

may submit a statement to the Secretary setting forth the reasons for such disagreement.

(f) Staff and administration.--

(1) Each Council may appoint, and assign duties to, an executive director and such other full- and part-time administrative employees as the Secretary determines are necessary to the performance of its functions.

(2) Upon the request of any Council, and after consultation with the Secretary, the head of any Federal agency is authorized to detail to such Council, on a reimbursable basis, any of the personnel of such agency, to assist such Council in the performance of its functions under this chapter.

(3) The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council.

(4) The Administrator of General Services shall furnish each Council with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(5) The Secretary and the Secretary of State shall furnish each Council with relevant information concerning foreign fishing and international fishery agreements.

(6) Each Council shall determine its organization and prescribe its practices and procedures for carrying out its functions under this chapter, in accordance with such uniform standards as are prescribed by the Secretary. Each Council shall publish and make available to the public a statement of its organization, practices, and procedures.

(7) The Secretary shall pay --

(A) the compensation and expenses provided for in subsection (d) of this section;

(B) appropriate compensation to employees appointed under paragraph (1);

(C) the amounts required for reimbursement of other Federal agencies under paragraphs (2) and (4);

(D) the actual expenses of the members of the committees and panels established under subsection (g) of this section; and

(E) such other costs as the Secretary determines are necessary to the performance of the functions of the Councils.

(g) Committees and panels. --

(1) Each Council shall establish and maintain, and appoint the members of, a scientific and statistical committee to

assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

(2) Each Council shall establish such other advisory panels as are necessary or appropriate to assist it in carrying out its functions under this chapter.

(h) Functions. -- Each Council shall, in accordance with the provisions of this chapter --

(1) prepare and submit to the Secretary a fishery management plan with respect to each fishery within its geographical area of authority and, from time to time, such amendments to each such plan as are necessary;

(2) prepare comments on any application for foreign fishing transmitted to it under section 1824 (b)(4)(B) of this title, and any fishery management plan or amendment transmitted to it under section 1854 (c)(2) of this title;

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and

implementation of the provisions of this chapter;

(4) submit to the Secretary --

(A) a report, before February 1 of each year, on the Council's activities during the immediately preceding calendar year,

(B) such periodic reports as the Council deems appropriate, and

(C) any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 1853(a)(3) and (4) of this title with respect to the optimum yield from the capacity and extent to which United States fish processors will process United States harvested fish from, and the total allowable level of foreign fishing in, each fishery within its geographical area of authority; and

(6) conduct any other activities which are required by, or provided for in, this chapter or which are necessary and appropriate to the foregoing functions.

Pub.L. 94-265, Title III, § 302, Apr. 13, 1976, 90 Stat. 347, amended Pub.L. 95-354 § 5(l), Aug. 28, 1978, 92 Stat. 521; Pub.L. 95-561, Title II, § 234, Dec. 22, 1980, 94 Stat. 3299 (amended 1983).

16 U.S.C. § 1853. Contents of fishery management plans.

(a) Required provisions. -- Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall --

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are --

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b) of this section, or both; and

(C) consistent with the national standards, the other provisions of this chapter, and any other applicable law;

(2) contain a description of the fishery, including, but not limited to the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and

the maximum sustainable yield and optimum yield from the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify --

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3).

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States; and

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors.

(b) Discretionary provisions. -- Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may --

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of

the coastal States nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such systems, the Council and the Secretary take into account --

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations; and

(7) prescribed such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

(c) Proposed regulations. -- Any Council may prepare any proposed regulations which it deems necessary and appropriate to carry out any fishery management plan, or any amendment to any fishery management plan, which is prepared by it. Such proposed regulations shall be submitted to the

Secretary, together with such plan or amendment for action by the Secretary pursuant to sections 1854 and 1855 of this title.

(d) Confidentiality of statistics. -- Any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) of this section shall be confidential and shall not be disclosed except when required under court order. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics.

Pub.L. 94-265, Title III, § 303, Apr. 13, 1976, 90 Stat. 351, amended Pub.L. 95-354, § 5 (2), (3), Aug. 28, 1978, 92 Stat. 521 (amended 1983).

16 U.S.C. § 1854. Action by the Secretary.

(a) Action by the Secretary after receipt of plan. -- Within 60 days after the Secretary receives any fishery management plan, or any amendment to any such plan, which is prepared by any Council, the Secretary shall --

(1) review such plan or amendment pursuant to subsection (b) of this section; and

(2) notify such Council in writing of his approval, disapproval of such plan or amendment.

In the case of disapproval or partial disapproval, the Secretary shall include in such notification a statement and explanation of the Secretary's objections and the reasons therefor, suggestions for improvement, a request to resubmit the plan or amendment, as so modified, to the Secretary within 45 days after the date on which the Council receives such notification.

(b) Review by the Secretary. -- The Secretary shall review any fishery management plan, and any amendment to any such plan, prepared by any Council and submitted to him to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law. In carrying out such review, the Secretary shall consult with --

(1) the Secretary of State with respect to foreign fishing; and

(2) the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(c) Preparation by the Secretary. --

(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this chapter, and any other applicable law, if --

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan

for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, and the Council involved fails to change such plan or amendment in accordance with the notification made under subsection (a)(2) of this section.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(2)(A) Whenever, pursuant to paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall promptly transmit such plan or amendment to the appropriate Council for consideration and comment. Within 45 days after the date of receipt of such plan or amendment, the appropriate Council may recommend, to the Secretary, changes in such plan or amendment, consistent with the national standards, the other provisions of this chapter, and any other applicable law. After the expiration of such 45 day period, the Secretary may implement such plan or amendment pursuant to section 1855 of this title.

(3) Notwithstanding paragraph (1), the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system described in section 1853 (b)(6) of this title, unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(d) Establishment of fees. -- The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title. Such level shall not exceed the administrative costs incurred by the Secretary in issuing such permits.

(e) Fisheries Research. -- The Secretary shall initiate and maintain a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of this chapter. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management, including, but not limited to, biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish.

(f) Miscellaneous duties. -- (1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may --

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

Pub.L. 94-265, Title III, § 304, Apr. 13, 1976, 90 Stat. 352 (amended 1983).

16 U.S.C. § 1855. Implementation of fishery management plans.

(a) In general. -- As soon as practicable after the Secretary --

(1) approves, pursuant to section 1854(a) and (b) of this title, any fishery management plan or amendment; or

(2) prepares, pursuant to section 1854(c), any fishery plan or amendment;

the Secretary shall publish in the Federal Register (A) a notice of availability of such plan or amendment, and

(B) any regulations which he proposes to promulgate to implement such plan or amendment. Interested persons shall be afforded a period of not less than 45 days after such publication within which to submit in writing data, views, or comments on the plan or amendment, and on the proposed regulations.

(b) Hearing. -- The Secretary may schedule a hearing, in accordance with section 553 of Title 5, on any fishery management plan, any amendment to any such plan, and any regulations to implement any such plan or amendment. If any such hearing is scheduled, the Secretary may, pending its outcome --

(A) postpone the effective date of the regulations proposed to implement such plan or amendment; or

(B) take such other action as he deems appropriate to preserve the rights or status of any person.

(c) Implementation. -- The Secretary shall promulgate regulations to implement any fishery management plan or any amendment to any such plan --

(1) after consideration of all relevant matters -

(A) presented to him during the 45-day period referred to in subsection (a) of this section, and

(B) produced in any hearing held under subsection (b) of this section; and

(2) if he finds that the plan or amendment is consistent with the national standards, the other provisions of this chapter, and any other applicable law.

To the extent practicable, such regulation shall be put into effect in a manner which does not disrupt the regular fishing season for any fishery.

(d) Judicial review. -- Regulations promulgated by the Secretary under this chapter shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulations on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(e) Emergency actions. -- If the Secretary finds that an emergency involving any fishery resources exists, he may --

(1) promulgate emergency regulations, without regard to subsections (a) and (c) of this section, to implement any fishery management plan, if such emergency so requires; or

(2) promulgate emergency regulations to amend any regulation which implements any existing fishery management plan, to the extent required by such emergency.

Any emergency regulation which changes any existing fishery management plan shall be treated as an amendment to such plan for the period in which such regulation is in effect. Any emergency regulation promulgated under this subsection (A) shall be published in the Federal Register together with the reasons therefor; (B) shall remain in effect for not more than 45 days after the date of such publication, except that any such regulation may be repromulgated for one additional period of not more than 45 days; and (C) may be terminated by the Secretary at any earlier date by publication in the Federal Register of a notice of termination.

(f) Annual report. -- The Secretary shall report to the Congress and the President, not later than March 1 of each year, on all activities of the Councils and the Secretary with respect to fishery management plans, regulations to implement such plans, and all other activities relating to the conservation and management of fishery resources that were undertaken under this chapter during the preceding calendar year.

(g) Responsibility of the Secretary. -- The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. The Secretary may promulgate such regulations in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter.

Pub.L. 94-265, Title III, § 305, Apr. 13, 1976, 90 Stat. 354, amended Pub.L. 95-561, Title II, § 235, Dec. 22, 1980, 94 Stat. 3299(a) (amended 1983).

16 U.S.C. § 1856: State jurisdiction.

(a) In general. -- Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception. -- (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that --

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate

the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

Pub.L. 94-265, Title III, § 306, Apr. 13, 1976, 90 Stat. 355 (amended 1982 and 1983).

16 U.S.C. § 1857: Prohibited Acts. It is unlawful --

(1) for any person --

(A) to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter;

(B) to use any fishing vessel to engage in fishing after the revocation, or during the period of suspension, of an applicable permit issued pursuant to this chapter;

(C) to violate any provision of, or regulation under, an applicable governing international fishery agreement entered into pursuant to section 1821(c) of this title;

(D) to refuse to permit any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title) to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

(F) to resist a lawful arrest for any act prohibited by this section;

(G) to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C); or

(H) to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section;

(2) for any vessel other than a vessel of the United States, and for

the owner or operator of any vessel other than a vessel of the United States, to engage in fishing --

(A) within the boundaries of any State; or

(B) within the fishery conservation zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is authorized by, and conducted in accordance with, a valid and applicable permit issued pursuant to section 1824(b) or (c) of this title; and

(3) for any vessel of the United States, and for the owner or operator of any vessel of the United States, to transfer directly or indirectly, or attempt to so transfer, any United States harvested fish to any foreign fishing vessel, while such foreign vessel is within the fishery conservation zone, unless the foreign fishing vessel has been issued a permit under section 1824 of this title which authorizes the receipt by such vessel of United States harvested fish of the species concerned.

Pub.L. 94-265, Title III, § 307, Apr. 13, 1976, 90 Stat. 355, amended Pub.L. 95-354, § 5(4), Aug. 28, 1978, 92 Stat. 521 (amended 1982 and 1983).

16 U.S.C. § 1860: Civil Forfeitures.

(a) In general. -- Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish taken or retained in any manner, in connection with or as a result of the commission of any act prohibited by section 1857 of this title (other than any act for which the issuance of a citation under section 1861(c) of this title is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish shall, be forfeited to the United States pursuant to a civil proceeding under this section.

(b) Jurisdiction of courts. -- Any district of the United States which has jurisdiction under section 1861(d) of this title shall have jurisdiction, upon application by the Attorney General on behalf of the United States, to order any forfeiture authorized under subsection (a) of this section and any action provided for under subsection (d) of this section.

(c) Judgment. -- If a judgment is entered for the United States in a civil forfeiture proceeding under this section, the Attorney General may seize any property or other interest declared forfeited to the United States which has not previously been seized pursuant to this chapter or for which security has not previously been obtained under subsection (d) of this section. The provisions of the custom laws relating to
--

(1) the disposition of forfeited property,

(2) the proceeds from the sale of forfeited property,

(3) the remission or mitigation of forfeiture, and

(4) the compromise of claims,

shall apply to any forfeiture ordered, and to any case in which forfeiture is alleged to be authorized, under this section, unless such provisions are inconsistent with the purposes, policy, and provisions of this chapter. The duties and powers imposed upon the Commissioner of Customs or other persons under such provisions shall, with respect to this chapter be performed by officers or other persons designated for such purpose by the Secretary.

(d) Procedure. -- (1) any officer authorized to serve any process in rem which is issued by a court having jurisdiction under section 1861(d) of this title shall --

(A) stay the execution of such process; and

(B) discharge any fish seized pursuant to such process;

upon the receipt of a satisfactory bond or other security from any person claiming such property. Such bond or other security shall be conditioned upon such person (i) delivering such property to the appropriate court upon order ~~thereof~~, without any impairment of its value, or (ii) paying the monetary value of such property pursuant to an order of such court. Judgment shall be recoverable on such bond or other security

against both the principal and any sureties in the event that any condition thereof is breached, as determined by such court.

(2) Any fish seized pursuant to this chapter may be sold, subject to the approval and direction of the appropriate court, for not less than the fair market value thereof. The proceeds of any such sale shall be deposited with such court pending the disposition of the matter involved.

(e) Rebuttable presumption. -- For purposes of this section, it shall be a rebuttable presumption that all fish found on board a fishing vessel which is seized in connection with an act prohibited by section 1857 of this title were taken or retained in violation of this chapter.

Pub.L. 94-265, Title III, § 310, Apr. 13, 1976, 90 Stat. 357 (amended 1983).

16 U.S.C. § 1861: Enforcement

(a) Responsibility. -- The provisions of this chapter shall be enforced by the Secretary and the Secretary of the department in which the Coast Guard is operating. Such Secretaries may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency, in the performance of such duties. Such Secretaries shall report annually on June 30, to each committee of the Congress listed in section 1823(b) of this title and

to the Councils, on the degree and extent of known and estimated compliance with the provisions of this chapter during the preceding calendar year.

(b) Powers of authorized officers. -- Any officer who is authorized by the Secretary, the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a) of this section to enforce the provisions of this chapter may --

(1) with or without a warrant or other process --

(A) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 1857 of this title;

(B) board, and search or inspect, any fishing vessel which is subject to the provisions of this chapter;

(C) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this chapter;

(D) seize any fish (wherever found) taken or retained in violation of any provision of this chapter; and

(E) seize any other evidence related to any violation of any provision of this chapter;

(2) execute any warrant or other process issued by any court of competent jurisdiction; and

(3) exercise any other lawful authority.

(c) Issuance of citations. -- If any officer authorized to enforce the provisions of this chapter (as provided for in this section) finds that a fishing vessel is operating or has been operated in violation of any provision of this chapter, such officer may, in accordance with regulations issued jointly by the Secretary and the Secretary of the department in which the Coast Guard is operating, issue a citation to the owner or operator of such vessel in lieu of proceeding under subsection (b) of this section. If a permit has been issued pursuant to this chapter for such vessel, such officer shall note the issuance of any citation under the permit. The Secretary shall maintain a record of all citations issued pursuant to this subsection.

(d) Jurisdiction of courts. -- The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter. In the case of Guam, and any Commonwealth, territory, or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam, except that in the case of American Samoa, the appropriate court is the United States

District Court for the District of Hawaii.
Any such court may, at any time --

- (1) enter restraining orders or prohibitions;
- (2) issue warrants, process in rem, or other process;
- (3) prescribe and accept satisfactory bonds or other security; and
- (4) take such other actions as are in the interest of justice.

(e) Definition. -- For purposes of this section --

(1) The term "provision of this chapter" includes (A) any regulation or permit issued pursuant to this chapter and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 1821(b) or (c) of this title, with respect to fishing subject to the exclusive fishery management authority of the United States.

(2) The term "violation of any provision of this chapter" includes (A) the commission or any act prohibited by section 1857 of this title, and (B) the violation of any regulation, permit, or agreement referred to in paragraph (1).

Pub.L. 94-265. Title III, § 311, Apr. 13, 1976, 90 Stat. 358, amended Pub.L. 96-470, Title II, § 209(e), Oct. 19, 1980, 94 Stat. 2245 (amended 1983).

Other Statutes28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
- (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 911. Words and terms used in chapter

When used in this chapter --

- (1) The term "document" includes registry and enrollment and license;
- (2) The term "documented" means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;
- (3) Except as provided in section 1011 of this title, the term "port of documentation" means the port at which the vessel is documented, in accordance with law;
- (4) The term "vessel of the United States" means any vessel documented under the laws of the United States and

such vessel shall be held to continue to be so documented until its documents are surrendered with the approval of the Secretary of Transportation; and

(5) the term "mortgage", in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed.

46 U.S.C. § 951. Lien of preferred mortgage; foreclosure; jurisdiction; procedure; foreign ship mortgages

A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in section 925 of this title, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this section, shall not constitute a jurisdictional defect; but the libellant shall be

liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subsection (c) of section 941 of this title.

Foreign ship mortgages: As used in sections 951 to 954 of this title, the term "preferred mortgage" shall include, in addition to a preferred mortgage made pursuant to the provisions of this chapter, any mortgage, hypothecation, or similar charge created as security upon any documented foreign vessel (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons) if such mortgage, hypothecation, or similar charge has been duly and validly executed in accordance with the laws of the foreign nation under the laws of which the vessel is documented and has been duly registered in accordance with such laws in a public register either at the port of registry of the vessel or at a central office; and the term "preferred mortgage lien" shall also include the lien of such mortgage, hypothecation, or similar charge: Provided, however, That such "preferred mortgage lien" in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries, performed or supplied in the United States.

46 U.S.C. § 961. Surrender of documents; termination of mortgagee's interest; sale of mortgaged vessel

(a) The documents of a vessel of the United States covered by a preferred mortgage may

not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of the United States or any foreign country) without the approval of the Secretary of Transportation. The Secretary shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forfeiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure, or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all preexisting claims thereon; but the court shall, upon the request of the mortgagee, the libellant, or any intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the Secretary of Transportation. Any assignment in violation of any provision of this chapter shall be void.

(e) No bond, note, or other evidence of indebtedness which is secured by a mortgage of a vessel to a trustee may be issued, transferred, or assigned to a person not a citizen of the United States, without the approval of the Secretary of Transportation, unless the trustee or substitute trustee of such mortgage is approved by the Secretary of Transportation. The Secretary of Transportation shall grant his approval if such trustee or substitute trustee is a bank or trust company which (1) is organized as a corporation, and is doing business, under the laws of the United States or any State thereof, (2) is authorized under such laws to exercise corporate trust powers, (3) is a citizen of the United States, (4) is subject to supervision or examination by Federal or State authority, and (5) has a combined capital and surplus (as set forth in its most recent published report of condition) of at least \$3,000,000. If such trustee or a substitute trustee at any time ceases to meet the foregoing qualifications, the Secretary of Transportation shall disapprove such trustee or substitute trustee, and after such disapproval the transfer or assignment of such bond, note, or other evidence of indebtedness to a person not a citizen of the United States, without the approval of the Secretary of Transportation, shall be unlawful. If a bond, note, or other evidence of indebtedness which is secured by a

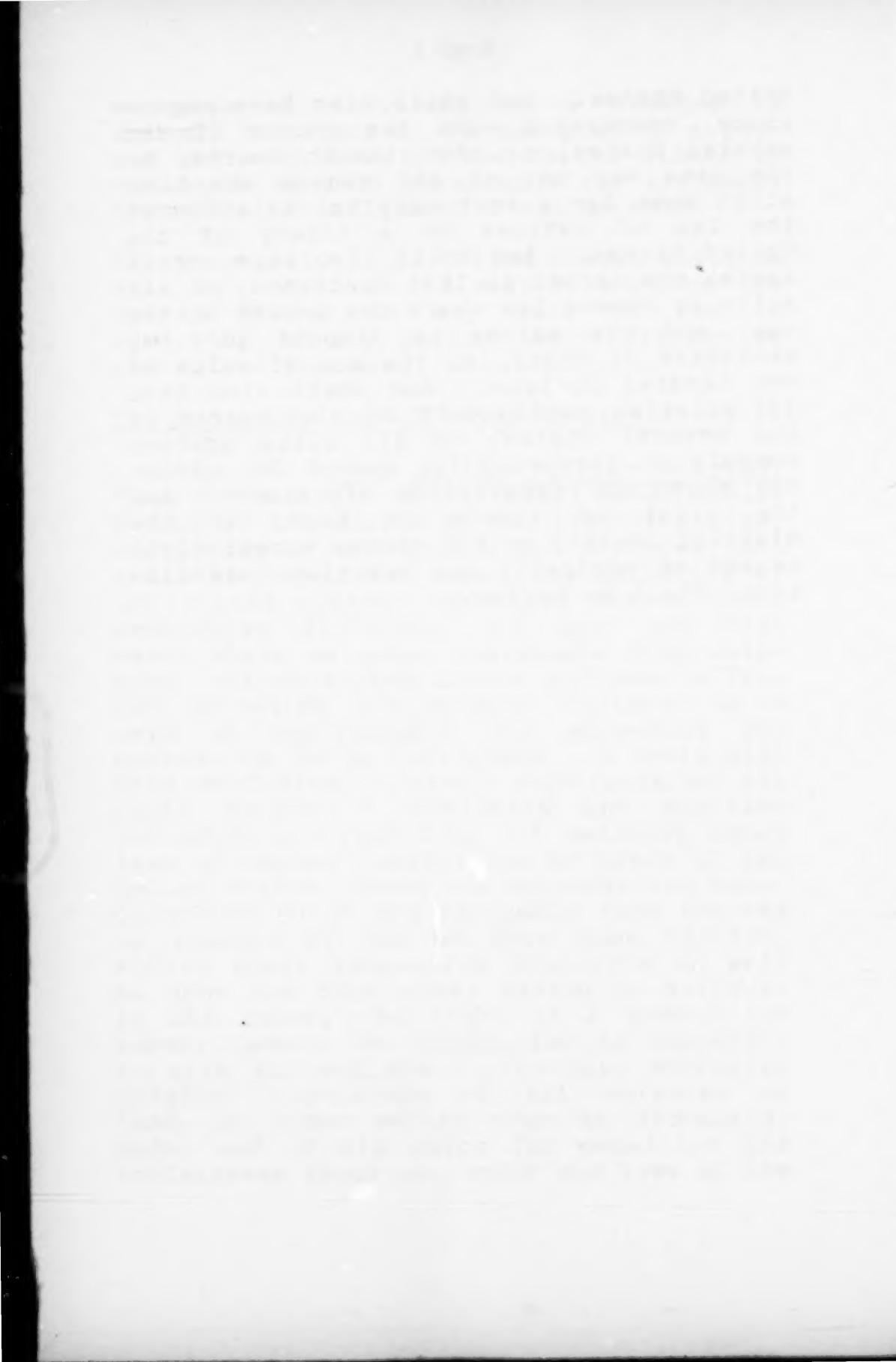
mortgage of a vessel to a trustee is issued, transferred, or assigned to a person not a citizen of the United States in violation of this paragraph, the issuance, transfer, or assignment shall be void.

(f) No vessel of the United States shall be sold by order of a district court of the United States in any suit in rem in admiralty to any person not a citizen of the United States.

The Judiciary Act of 1789, (1 Stat.76-77

Sec. 9. And be it further enacted, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it, and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the

United States. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum of value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.



APPENDIX F

Alaskan Statutes

AS 16.05.190: Seizure without warrant and confiscation by court.

Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter, or rule or regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter, or rule or regulation of the department shall be seized by any person designated in § 150 of this chapter. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or rule or regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds and other paraphernalia seized under the provisions of this chapter, or court, shall be returned, after completion of the case and payment of the fine, if any. (§ 23 art I ch 94 SLA 1959)

AS 16.05.195: Forfeiture of equipment.

(a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.

(b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.

(e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department (§ 3, ch 124 SLA 1974) (amended 1983).

AS 16.05.475. Registration of fishing vessels.

(a) It is unlawful for any person to employ a fishing vessel in the water of Alaska unless it is registered under the laws of the state. Vessels registered under the laws of another state, and persons residing in another state, are not excused from this provision.

(b) The term "employ", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any activities involving the use or navigation of fishing vessels.

(c) The term "registered under the laws of the state", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any existing requirements regarding registration, licenses, permits, and similar matters imposed by law or regulation together with modification of them and with any additional requirements the board finds necessary to maximize the authority of the state to apply and enforce fisheries regulations under the Fishery Conservation and Management Act of 1976 (P.L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 et seq.)

(d) The term "fishing vessel", as used in this section, means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for

(1) fishing, or

(2) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing. (\$ 7 ch 105 SLA 1977)

AS 16.05.920. Certain acts made unlawful.

(a) Unless permitted by this chapter or by regulation made under this chapter, it is unlawful for a person to

take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine, aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

(b) No person may knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this chapter, or a poster or notice to the public concerning the provisions of this chapter, or regulation adopted under this chapter, or a marker indicating the boundary of an area closed to hunting, trapping, fishing, or other special use under this chapter. No person may knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this chapter or a regulation adopted under this chapter. (§ 28 art 1 ch 94 SLA 1959; am § 3 ch 110 SLA 1970)

AS 16.10.210. Unlawful sale or offer prohibited.

It is unlawful for a person to possess, purchase, offer to purchase, sell, or offer to sell in the state migratory fish or migratory shellfish

F-6

taken on the high seas knowing that they were taken in violation of a regulation promulgated by the Board of Fisheries governing the taking of migratory fish or migratory shellfish in certain areas designated by the Board of Fisheries or the commissioner. (§ 4 ch 121 SLA 1960; am § 23 ch 206 SLA 1975)

APPENDIX G

5 AAC 34.085. AGREEMENTS FOR USE PRIVATE

(a) Any person who has applied for and been issued a valid interim-use permit card for king crab pots or a commercial fishing vessel license or who has registered a vessel or any gear for a king crab registration area has agreed

(1) to engage in fishing for king crab only in a statistical area encompassing a registration area for which the vessel is validly registered;

(2) to engage in fishing for king crab only in districts where the season is open in statistical areas which are subdivided into districts;

(3) to engage in fishing for king crab only if the season in the registration area for which the vessel is validly registered is open;

(4) to engage in fishing for king crab in statistical areas in compliance with all regulations (including partial closures) governing king crab fishing in the registration area encompassed by the statistical area; and

(5) to comply with the provisions and requirements of 5 AAC 39.130.

(b) A permit holder or registrant further agrees that the agreement contained in subsection (a) of this section shall have the force of regulation.

(c) The permit holder or registrant has entered into the above described agreement in return for receiving from the state a use privilege to fish for king crab inhabiting waters subject to the jurisdiction of the state, and is entitled to all rights and privileges to engage in such fishing for king crab consistent with applicable laws and regulations.

Authority: AS 16.05.251(7)
AS 16.05.690

(July 1983)

5 AAC 34.090. UNLAWFUL POSSESSION OF KING CRAB OR KING CRAB GEAR.

(a) It is unlawful for any person to possess unprocessed king crab aboard a vessel licensed as a commercial fishing vessel within any registration area unless the vessel is validly registered for the area and the season is open, or unless the person is acting pursuant to the authorization of sec. 30(d), sec. 33, or sec. 35(e) of this chapter.

(b) It is unlawful for any person to possess aboard a vessel licensed as a commercial fishing vessel within any registration area any king crab or any gear (including aggregate amounts of gear) used in the taking of king crab, if such king crab or king crab gear are

prohibited by other regulations in this chapter governing such registration area. If a vessel is acting pursuant to the authorization of sec. 30(d) of this chapter, that vessel shall be governed by regulations of the area for which it is validly registered at the time.

(c) It is unlawful for any person to possess, purchase, sell, barter, or transport king crab within the state or within waters subject to the jurisdiction of the state if that person knows or has reason to know that such king crab were taken or possessed in contravention of the regulations of this chapter.

Authority: AS 16.05.251(a)(4)(7) and (10)
AS 16.05.720
AS 16.05.900
AS 16.05.920

(July 1980).

5 AAC 34.810. FISHING SEASONS

(a) After an opening time and date for taking king crab set forth in (b) of this section, no person may possess or transport aboard any registered king crab vessel, or any tender, any species of king crab until that vessel has complied with the inspection provisions of sec. 30(b) of this chapter.

(b) Red, blue and brown king crab six and one-half inches (165 mm) or larger in width of shell may be taken or possessed from 12:00 noon September 10 through April 15 unless closed earlier by emergency order, except that red,

blue and brown king crab seven inches (178 mm) or greater in width of shell may be taken or possessed during periods opened and closed by emergency order.

Authority: AS 16.05.060
AS 16.05.251(a)(2) and (3)

(July 1980).

5 AAC 39.120. REGISTRATION OF COMMERCIAL FISHING VESSELS.

(a) A person who owns a commercial fishing vessel or his authorized agent shall register that vessel by completing a vessel license application or renewal form and submitting it to the Commercial Fisheries Entry Commission. Vessel registration is required before fishing or transporting fish in any waters of Alaska.

(1) A vessel, if it is in compliance with all regulations governing registration and if it displays a license issued under AS 16.05.530, is considered to be registered under the laws of the state and may be employed in the taking or transporting of fish.

(2) In this section

(A) "employ" or "employed" means taking or attempting to take fish, or transporting fish which have been taken or any operation of a vessel aiding or assisting in the taking or transporting of fish;

(B) "in compliance with all regulations governing registration" includes vessel registration required by secs. 20 and 70 of chs. 31, 32, 34, 35, and 38 and includes district or subdistrict registration requirements of chs. 03-38 of this title, and includes the provisions of this section;

(C) "registered under the laws of the state" means that a vessel displays a license described in 20 AAC 05.958 and issued under AS 16.05.530, and that the registration provisions of chs. 03-39 of this title have been complied with and evidence of compliance is immediately available at all times during fishing or transporting operations, and can be shown upon request to any authorized representative of the department.

(3) It is unlawful to take, attempt to take or possess unprocessed fish aboard a vessel in the waters of Alaska unless the vessel is registered under the laws of the state.

(b) Area registration requirements for shellfish vessels are as specified in the registration regulations in chs. 31-38 of this title.

(c) Area registration requirements for salmon net fishing vessels are as follows:

(1) a person who owns a fishing vessel to be used to take salmon with

net gear, or his authorized agent, shall register for an area by designating on the vessel license application or renewal form the vessel's one area of intended salmon net gear operation for the year; it is unlawful for a vessel to engage in salmon net fishing in an area other than the single area selected:

(2) in this section the term "area" means any registration area listed in (d) of this section, except that

(A) in salmon net registration area T, a vessel must also be registered by the department for a fishing district as required by 5 AAC 06.370;

(B) in salmon net registration area Y, a vessel must also be registered by the department for a fishing district as required by 5 AAC 03.370;

(3) a vessel registered for an area of salmon net fishing in compliance with (c)(1) of this section will be issued, by the Commercial Fisheries Entry Commission, a vessel license area tab for that year; it is unlawful for a vessel to fish in the area of registration unless the vessel displays the area tab on the vessel license number plate; no vessel owner or operator may possess for each vessel, or no vessel may display, more than one vessel license area tab;

(4) a person who owns a fishing vessel registered for an area of intended operation in compliance with (c)(1) of this section or his authorized agent may reregister it for a different salmon net registration area under the following conditions:

(A) the reregistration of a salmon net fishing vessel shall be authorized

(i) by the commissioner upon receipt of proof in writing that the vessel has been lost through sinking, destruction, or extensive mechanical breakdown, or that the vessel operator has suffered serious injury, sickness or death during the open season; or

(ii) by the Commercial Fisheries Entry Commission upon receipt of a written certification or personal affidavit stating that the vessel has not been used for salmon net fishing in the original area of registration;

(B) a person authorized to register a vessel must complete a reregistration form issued by the Commercial Fisheries Entry Commission and submit it to the commissioner together with any previously issued vessel license area tab;

(C) it is unlawful for a vessel to fish in the area of registration unless the vessel displays the appropriate area tab on the vessel license number plate;

(D) area registration under this section shall supersede the original area registration as if the original area registration had never been made.

(d) Salmon net gear registration areas are as follows:

<u>Code Letter</u>	<u>Area</u>
A --	Southeastern Alaska area (5 AAC 33.100)
D --	Yakutat area (5 AAC 30.100)
E --	Prince William Sound area (5 AAC 24.100) and the Yakataga district of the Yakutat area (5 AAC 30.100(a))
H --	Cook Inlet area (5 AAC 21.100)
K --	Kodiak area (5 AAC 18.100)
L --	Chignik area (5 AAC 15.100)
M --	Aleutian Islands and Alaska Peninsula areas (5 AAC 12.100 and 09.100)
T --	Bristol Bay area (5 AAC 06.100) and January 1 through June 30, the Cinder River and Port Heiden sections of the Alaska Peninsula area and August 1 through December 31, the Cinder River, Port Heiden and Ilnik sections of the Alaska Peninsula area (5 AAC 200(a)(1),(2),(3)).
W --	Kuskokwim area (5 AAC 07.100)
X --	Kotzebue-Northern area (5 AAC 03.100)
Y --	Yukon area (5 AAC 05.100)
Z --	Norton Sound-Port Clarence area (5 AAC 04.100)

(e) Evidence of proper registration or licensing must be kept immediately available at all times during fishing operations and must be shown upon request to any peace officer of the state.

(f) The provisions of this section do not apply to halibut fishing.

(g) Registration requirements for salmon troll fishing vessels are as follows:

(1) the owner or operator of any fishing vessel that is to be used to take salmon with hand or power troll gear shall register that vessel with the department;

(2) no fishing vessel may be registered as both a hand troll and a power troll vessel;

(3) registration is accomplished by completing a form provided by the department and returning that form to a department officer;

(4) any vessel that is to be used as a salmon troll fishing vessel must be registered before April 15 of each calendar year;

(5) this subsection becomes effective January 1, 1981.

Authority: AS 16.05.251(a)(2), (4), (5) and
(12)
AS 16.05.490
AS 16.05.510

(July 1980).

5 AAC 39.130. REPORTS REQUIRED OF PROCESSORS, BUYERS AND FISHERMEN.

* * *

(e) The following information regarding the transporting of unprocessed fish shall be transmitted to an authorized representative of the department either verbally, in writing, or by telephone:

(1) the number and species of salmon taken in any regulatory area shall be reported before being transported to any other area or out of the state;

(2) the numbers or pounds by species of all other fish shall be reported before being transported out of the state.

* * *

(July 1980).

5 AAC 39.197. UNLAWFUL POSSESSION OF FISH.

No person may possess, purchase, sell, barter or transport fish within the state or within water subject to the jurisdiction of the state if that person knows or has reason to know that the fish were taken or possessed in contravention of 5 AAC 03-5 AAC 09.

Authority: AS 16.05.251(a)(10)

(July 1981).

APPENDIX H

Alaska Court Criminal Rule 37

Rule 37. Search and Seizure.

(a) Search Warrant--Issuance and Contents.

(1) A search warrant authorized by law shall issue only on

(i) (aa) affidavit sworn to before a judge or magistrate or any person authorized to take oaths under the law of the state, or

(bb) sworn testimony taken on the record in court, and

(ii) establishing the grounds for issuing the warrant.

(2) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

(i) identifying the property, and

(ii) naming or describing the person or place to be searched.

(3) The warrant

(i) shall be directed to a peace officer of the state authorized to enforce or assist in enforcing any law thereof, and

(ii) shall state the ground or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof, and

(iii) shall command the officer to search forthwith the person or place named for the property specified, and

(iv) shall direct that it be served between 7:00 a.m. and 10:00

p.m., but if an affiant is positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time, and

(v) shall designate the judge or the magistrate to whom it shall be returned.

(b) Execution and Return with Inventory. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken.

The return shall be made promptly and shall be accompanied by a written inventory of any property taken as a result of the search pursuant to or in conjunction with the warrant. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer under the penalty of perjury pursuant to AS 09.65.012. The judge or magistrate shall upon request deliver a copy of

the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(c) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

(d) In Camera Hearing. A person who challenges the validity of a search and seizure predicated on information gained from an informant used either in

(1) support of an application for a warrant, or

(2) as the basis of a search without warrant may move the court for disclosure of the identity of the informant pursuant to Rule 16. In the event the court determines that disclosure of the identity of the informant is not required under Rule 16, the court shall conduct an in camera recorded hearing in which it shall investigate and take evidence so as to determine whether or not a search based on the informant's information was justified. Following the in camera hearing, the court shall grant or deny the motion to suppress on the record, and shall make written findings concerning the

validity of the search based on the informer's information. The written findings, together with the record of the hearing, shall be sealed, and if the validity of the search is upheld the sealed testimony and findings shall, on appeal of a conviction in which evidence of the search was admitted, be transmitted to the supreme court for automatic review of the motion to suppress. (Amended by Chapter 17 SLA 1969 effective June 25, 1969 and by Supreme Court Order 157 effective February 15, 1973) (amended 1982).

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FILED
JUL 30 1984
ALEXANDER L STEVENS,
STATES CLERK

No. 83-1851

IN THE SUPREME COURT OF THE UNITED

October Term, 1983

F/V BARANOF, its gear, paraphernalia,
etc.;

BARANOF FISHERIES, A Washington Limited
Partnership;

RAINER NATIONAL BANK; and

RAINER NATIONAL BANK, as Trustee for
Universal Seafoods, Ltd.,

Petitioners,

vs.

STATE OF ALASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION

NORMAN C. GORSUCH
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STATE OF ALASKA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882, extinguish state court jurisdiction to enforce state fishery regulations against state registered vessels beyond the three-mile territorial sea?
2. Is a vessel that registers and is licensed under state fishery laws "registered under the laws of [the] state" within the meaning of 16 U.S.C. 1856(a)?
3. Do in rem vessel forfeiture actions brought to enforce state fishery laws lie exclusively within federal admiralty jurisdiction?
4. Do provisions of the Ship Mortgage Act of 1920, at 46 U.S.C. 951, divest state courts of in rem forfeiture jurisdiction over vessels subject to preferred ship mortgages?

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No. 83-1851

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1984

F/V BARANOF, its gear,
paraphernalia, etc.;
BARANOF FISHERIES, A Washington
Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee
for Universal Seafoods, Ltd.

Petitioners,

v.

STATE OF ALASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The February 10, 1984, opinion of the Supreme Court of the State of Alaska is reported at 677 P.2d 1245. 1/

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1257(3). As articulated in the argument infra, the State of Alaska denies that this case presents a final decision reviewable by this Court.

CONSTITUTIONAL PROVISIONS, STATUTES,
AND REGULATIONS INVOLVED

Constitutional Provisions (App. D, infra):

Alaska Const. art. VIII, § 2, 4

United States Statutes (App. C, infra):

Magnuson Fishery Conservation and

1/ The opinion as published in the Pacific Reporter corrects the citations of 16 U.S.C. 1812 and 16 U.S.C. 1856(a), erroneously cited as 46 U.S.C. 1812 and 46 U.S.C. 1856(a) in the slip opinion (Appendix A of Petition, at 28).

Management Act, 16 U.S.C. 1801(b),
1856(a), 1861(d), 1861(e)
28 U.S.C. 1257(3)
28 U.S.C. 1333(1)
Ship Mortgage Act of 1920, 46 U.S.C.
951, 954(a)

Alaska Statutes and Regulations
(App. D, *infra*):

AS 16.05.221(a)
AS 16.05.251
AS 16.05.475
AS 16.05.490(a)
AS 16.05.520

5 AAC 34.020
5 AAC 34.030
5 AAC 39.120(a)
5 AAC 39.120(b)

STATEMENT OF THE CASE

Alaska has exercised management authority over king crab beyond its three mile territorial sea since the Bering Sea king crab fishery developed in the 1960's. There are presently no federal

regulations governing management of the domestic king crab fishery. 2/

On May 9, 1981, under terms of a valid search warrant, State of Alaska fish and wildlife protection officers seized the F/V Baranof in Dutch Harbor, Alaska, and the State then promptly filed an in rem forfeiture complaint, alleging that the vessel harvested 298,651 pounds of king crab in closed waters in 1979 and 1980, and violated numerous state king crab transportation and reporting provisions. 3/

The F/V Baranof is a 797 ton steel hulled fishing vessel and processor which is home ported in Washington state, but which fishes for king crab off the coast of Alaska. At the time of the

2/ The federal government does restrict king the crab fishing activities of foreign vessels.

3/ The Alaska supreme court opinion characterizes the charges as "exceed[ing] its authorized catch limit." 677 P.2d 1247. As evidenced in the complaint, Appendix A, infra, the charges did not specifically include a "catch limit" violation.

violations, the vessel bore Alaska Department of Fish and Game vessel license and plate no. 34855.

The State alleges that the fishing vessel's illegal activities occurred in Bristol Bay (State fisheries statistical area T) off the coast of Alaska, beyond the State's three-mile territorial sea, within the three-to-two-hundred mile fishery conservation zone ("FCZ").

Pursuant to a stipulation, the State released the vessel to its owners on May 27, 1981, pending the outcome of the case. On June 3, 1981, the F/V Baranof's owners and lienholders, who are Washington state residents (hereinafter collectively referred to as "Petitioners" or "the F/V Baranof"), petitioned to remove the case to the United States District Court for the District of Alaska. The F/V Baranof asserted, as bases for federal jurisdiction: diversity of citizenship, violation of due process under the Fourteenth Amendment to the United States Constitution, exclusive federal jurisdiction under the Magnuson Fishery

Conservation and Management Act, 16 U.S.C. 1801-1882 ("MFCMA"), exclusive admiralty jurisdiction over in rem forfeitures, and exclusive federal jurisdiction over preferred ship mortgages under the Ship Mortgage Act of 1920, 46 U.S.C. 911-984.

The district court rejected each claim of jurisdiction. It held that the case was within the saving to suitors clause of 28 U.S.C. 1333(1) and hence cognizable in state court, that there was no diversity of citizenship, and that the assertions of jurisdiction based on the MFCMA, the Ship Mortgage Act, and the Fourteenth Amendment were insufficient because they were interposed only as defenses to the State's claims. The district court "remanded" the case to the Alaska superior court. Thereafter, the F/V Baranof filed a pre-answer motion to dismiss in the state trial court, alleging as defenses essentially the same issues presented in the instant petition for certiorari.

The trial court granted the motion to dismiss on the basis that the

MFCMA preempted state fisheries enforcement in the FCZ and provided for an exclusive federal forum. However, the court rejected all the F/V Baranof's other arguments, holding that the Ship Mortgage Act of 1920 does not provide exclusive federal court jurisdiction, that in rem actions do not lie exclusively in federal admiralty jurisdiction, and that the vessel's due process claim was moot.

The State appealed and the F/V Baranof cross-appealed to the Alaska supreme court. Both the United States, on behalf of the Secretary of Commerce, and the State of California, participated as amici curiae in the appeal and cross-appeal. Both amici fully supported the State's position that Alaska has management and enforcement authority over its king crab fishery in the FCZ. The Secretary of Commerce summarized the United States position as follows:

Section 306(a) [16 U.S.C. 1856(a)] expresses the intent of Congress to permit continued state

jurisdiction and authority over fishing ... by state-registered vessels outside state waters.

Brief of Secretary of Commerce as Amicus Curiae, at 10-11, in State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984).

The Alaska supreme court unanimously reversed the trial court's order of dismissal. It held that the MFCMA does not provide exclusive federal jurisdiction over fisheries violations in the FCZ and that it does not preempt state fisheries management in the FCZ absent conflicting federal rules. It affirmed the superior court's rulings that the Ship Mortgage Act of 1920 does not provide exclusive federal jurisdiction, that an *in rem* forfeiture action is not exclusively within federal admiralty jurisdiction, and that the vessel's seizure was not a violation of due process. The supreme court remanded the case to the trial court for a trial on the merits. The F/V Baranof has petitioned for a writ of certiorari to review this decision.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary of Argument

The interlocutory decision Petitioners present is not within the narrow "collateral order" exception to the finality requirement of 28 U.S.C. 1257. The decision to remand the case to the trial court for trial has no "final and irreparable effect" on the parties, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949), and it is clearly correct on the merits.

Furthermore, the issues raised by petitioners are not substantial federal questions requiring review. The Alaska supreme court carefully reviewed the Petitioners' claims and correctly decided that the State has jurisdiction to prosecute this in rem action for violations of State king crab conservation regulations in the FCZ.

The Alaska supreme court's decision is in harmony with this Court's decisions, and follows a long line of cases that affirm the states' authority to regulate their valuable fishery resources both within and outside the

traditional three mile state territorial sea. Skiriotes v. Florida, 313 U.S. 69 (1941); F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130 (1981); State v. Bundrant, 546 P.2d 530 (Alaska 1976), appeal dismissed sub nom., Uri v. Alaska, 429 U.S. 806 (1976); People v. Weeren, 607 P.2d 1279 (Cal. 1980), cert. denied, 449 U.S. 839 (1980).

1. Review of the Alaska Court's Interlocutory Order Is Not Within This Court's Narrow "Collateral Order" Exception To The Finality Requirement.

Petitioners ask this Court to review an interlocutory ruling of the Alaska supreme court, which reversed the trial court's finding of exclusive federal jurisdiction under the MFCMA, and remanded the case for trial. The F/V Baranof relies on that narrow exception to the finality requirement of 28 U.S.C. 1257, which has allowed review of certain important, independent "collateral issues." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

However, as articulated further infra, Petitioners raise issues that are neither of sufficient importance to merit interlocutory review nor of such an independent nature as to require deferral of review until after final judgment.

As the Cohen Court held, the class of cases that merit interlocutory review is small. Only where the decision has a "final and irreparable effect on the rights of the parties" will review be granted. Cohen, 337 U.S. at 545. 4/ The instant case does not fall within this narrow "collateral order" exception to the finality rule, since Petitioners are not foreclosed from asserting error after trial on the merits. Furthermore, the claims raised by Petitioners are not

4/ In Cohen, the judgment this Court reviewed effectively precluded a minority shareholder from pursuing an action to challenge alleged mismanagement of over \$100 million in corporate stocks, by requiring pretrial posting of security for attorney fees. No similar preclusion of remedy exists in the instant case.

of such substantive merit or national significance as to require interlocutory review.

Given the insubstantial claims of error raised by Petitioners (discussed infra), and the relatively small inconvenience to Petitioners of proceeding to trial, 5/ there simply is no "irreparable effect" on Petitioners' rights so as to bring this case within the "collateral order" exception to the final judgment requirement of 28 U.S.C. 1257. Granting this petition could result in this Court

5/ This case does not present the spectre of long and complex litigation that might otherwise be avoided, regarding liquidation of national banks, and involving over 143 parties, presented in Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), cited by the F/V Baranof. This is a straightforward in rem forfeiture case involving crabbing violations by one vessel. Nor does this case involve a major national issue such as the right of labor unions to picket, presented in Local No. 438 Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963), also cited by Petitioners.

passing on issues that might be "dissipated by the final outcome of the case." Mercantile National Bank v. Langdeau, 371 U.S. 555, 572 (1963) (Harlan, J., diss.). See also Flynt v. Ohio, 451 U.S. 619 (1981).

2. The F/V Baranof's MFCMA Preemption Claim May Soon Be Mooted By Adoption Of A Federal King Crab Management Plan.

Not only do Petitioners seek review of a nonfinal judgment, but, as evidenced by Appendix B infra, it is likely that the issue raised by Petitioners regarding preemption by the MFCMA may soon be factually altered and mooted, because the federal government expects to adopt a king crab fishery management plan within the near future. Accordingly, it would be inappropriate to grant certiorari.

3. The F/V Baranof Does Not Present Major Federal Questions Meriting This Court's Review.

A. The MFCMA Recognizes And Provides For Continued State Fishery Management In The FCZ.

At the time Congress enacted the MFCMA in 1976, the law was well settled that states had jurisdiction over fishery violations beyond state territorial seas, where the state had a legitimate interest in, and sufficient nexus with, the fishing activity. Skirriotes v. Florida, 313 U.S. 69 (1941). Both the express language of the MFCMA and its legislative history confirm that Congress was fully aware of the importance of state fisheries management in and beyond state territorial seas, and of the need to continue sound state management in the FCZ in the absence of conflicting federal regulatory provisions. See generally Committee on Commerce and National Ocean Policy Study, 94th Cong., 2nd Sess., A Legislative History of the Fishery

Conservation and Management Act of 1976
77, 259, 328, 459, 677, and 961 (hereinafter cited as "Legislative History"). While providing for exclusive federal fishery management with respect to foreign fishing activities, Congress expressly authorized continued state management jurisdiction and enforcement authority in the FCZ over vessels "registered under the laws" of the states. 16 U.S.C. § 1856(a).

Nothing in the MFCMA manifests Congressional intent to preempt all state fishery regulations in the FCZ. Indeed, it would be inconsistent with the MFCMA's purpose of conserving and managing fishery resources (expressed at 16 U.S.C. 1801(b)) to create an instant void in management of the king crab fishery as of the March 1, 1977 effective date of the Act.

At the time Congress enacted the MFCMA, many coastal states, like Alaska, had well established fishery management programs in the FCZ, designed to protect and conserve resources valuable to their economies. Legislative History

at 230, 234. Had Congress intended a drastic curtailment of the states' Skiriotes jurisdiction, it would have so indicated. Indeed, this is what the court in People v. Weeren, 607 P.2d 1279, 1286-87 (Cal. 1980), cert. denied, 449 U.S. 837 (1980), concluded. Congress has not acted to overturn California's assertion of jurisdiction in the FCZ, although it could have, had it found California's action to be inconsistent with the MFCMA.

The F/V Baranof has simply failed to raise any substantial basis for challenging the Alaska supreme court's conclusion that the MFCMA recognizes and authorizes continued state management prerogatives in the FCZ.

B. Exercise of State Jurisdiction Over Vessels Registered Under State Fishery Laws Is In Full Harmony With The MFCMA's Objectives And With This Court's Prior Decisions.

The MFCMA expressly allows state regulatory authority in the FCZ over vessels "registered under the laws" of the states. 16 U.S.C. § 1856(a). The

F/V Baranof was registered under the laws of Alaska pursuant to AS 16.05.475, which requires that any fishing vessel "employ[ed] ... in the water of Alaska" must be registered "under the laws of the state." Other pertinent Alaska statutes and regulations require, as a condition to delivery or landing of crab or engaging in commercial fishing in the state, that a vessel obtain a vessel license and a permanent number plate, and complete a tank inspection by state officials. AS 16.05.490(a); AS 16.05.520; 5 AAC 34.020; 5 AAC 34.030; and 5 AAC 39.120(a) and (b). The F/V Baranof held the appropriate state licenses, bore a state vessel license plate, and landed king crab in Alaska.

The F/V Baranof argues that "vessel registration," as used in the MFCMA, applies only to federal vessel documentation laws, not state fishing vessel registration provisions. The Alaska supreme court correctly rejected this interpretation as being contrary to the plain language and purposes of the MFCMA, and as illogical.

The California supreme court in People v. Weeren also rejected this argument, noting that the term "vessel registration" is a term of art only for foreign -- not domestic -- federal vessel documentation laws, and that it would be contrary to the purposes of the MFCMA to assume that Congress intended to preclude state regulation of vessels registered under state laws. Id. at 1286.

The Alaska and California decisions are in complete harmony with Skiriotes. Skiriotes recognized the legitimate interest states have in managing the fisheries off their coasts, and the Skiriotes Court's recognition of state authority to regulate state citizens' fishing activities beyond territorial seas is fully consistent with Alaska's exercise of jurisdiction, within the FCZ, over vessels registered under its laws.

Alaska has a recognized legitimate interest in king crab, which migrate freely across territorial boundaries, and

in its king crab fishery. 6/ Vessels that engage in the king crab fishery and that are subject to State vessel registration laws have a close nexus to Alaska. As the Alaska supreme court stated in State v. Bundrant, 546 P.2d 530, 556 n.106 (Alaska 1976), appeal dismissed sub nom., Uri v. Alaska, 429 U.S. 806 (1976):

Bering Sea crabbers daily make use of Alaskan territorial waters and facilities, and probably could not continue to crab in the area without using Alaskan shore based facilities.

Accord, F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130 (1981). Alaska regulations governing king crab apply even-handedly to all vessels registered under Alaska law regardless of home port, and Congress has created no laws conflicting with that

6/ This aspect of crab biology is discussed in State v. Bundrant, 546 P.2d 530, 551 (Alaska 1976).

exercise of jurisdiction. Moreover, the Secretary of Commerce has adopted no regulations governing the harvest of king crab.

C. The MFCMA Does Not Divest State Courts Of Jurisdiction Over Violations Of State Fishery Laws Committed By State Registered Vessels in the FCZ.

The MFCMA provides exclusive federal jurisdiction only over cases "arising under provisions of this chapter." 16 U.S.C. 1861(d). The definition of "provisions of this chapter" refers only to regulations issued by the federal government, federally issued permits, and international fishery agreements. 16 U.S.C. 1861(e). Obviously, Congress carefully allocated fisheries management between state and federal agencies, and fisheries jurisdiction between state and federal courts, in order to best serve the objectives of the MFCMA. Accordingly, the definition makes no mention of state statutes or regulations.

The charges against the F/V Baranof involve conservation laws adopted by the State, not by the federal government, and made under state management directives to conserve and manage state fisheries. AS 16.05.221(a); AS 16.05.251; Alaska Const. art. VIII, §§ 2, 4. These management provisions predated the MFCMA and are not a part of federal law or regulation. 16 U.S.C. 1861(d) jurisdiction is therefore not involved at all.

Moreover, the F/V Baranof's argument that the instant case arises under the MFCMA does not present a substantial challenge to the well established principle that cases "arise under" federal laws only if a federal right or immunity is in fact a substantial and essential element of the case, upon which the result of the action depends. Gully v. First National Bank, 299 U.S. 109, 112 (1936). It is the federal nature of an action, not its source, that determines subject matter jurisdiction. Franchise Tax Board v. Laborers Vacation Trust, 103

S. Ct. 2841 (1983). The instant case involves alleged violations of state law.

Finally, from a pragmatic perspective, denial of state court jurisdiction over cases such as that against the F/V Baranof would defeat the conservation and management purposes of the MFCMA by hampering or precluding enforcement. Typically, king crab fishing violations occur off the Alaska coast, hundreds of miles from the nearest federal court in Anchorage. State courts exist in Dutch Harbor, Dillingham, Unalaska, and elsewhere near the fishing grounds, and thus provide a more convenient forum for issuance of warrants, review of release requests, and trials. Defendants, enforcement personnel, and witnesses usually live closer to State courts than to the federal court in Alaska. Also, State courts have over the years developed a familiarity with, and expertise regarding, State fishery management laws and procedures, a fact Congress surely recognized in allowing states continued management under the MFCMA.

The federal agency charged with administration of the MFCMA, the National Oceanic and Atmospheric Administration ("NOAA"), recognizes the need for joint state and federal management, and the crippling effect that divestment of state court jurisdiction would have on the overall objectives of the MFCMA, and filed an amicus brief urging the Alaska supreme court to affirm state court jurisdiction.

D. States Have In Rem Forfeiture Jurisdiction Over Fishery Violations, And The Ship Mortgage Act Does Not Limit That Jurisdiction.

The F/V Baranof asks, in essence, for this Court to overrule C. J. Hendry Co. v. Moore, 318 U.S. 133 (1942), which recognized state jurisdiction over in rem forfeiture actions under the saving to suitor's clause, 28 U.S.C. 1333(1). The Hendry Court recognized the distinction between an in rem action brought by an individual to enforce a maritime lien, which action was not within the common law, and an in rem action

brought by a sovereign state to forfeit a vessel for fishing violations, which was a common law remedy and therefore cognizable in state courts under the saving to suitors clause. The F/V Baranof has presented no sound legal or policy reasons for overturning state *in rem* jurisdiction recognized in Hendry, or extraterritorial enforcement sanctioned in Skiriotes.

In addition, when Congress adopted the Ship Mortgage Act of 1920, 46 U.S.C. 911-984, it did not thereby divest state courts of their common law forfeiture jurisdiction. As the Alaska supreme court correctly noted, the Ship Mortgage Act was enacted to provide a forum for vessel lien foreclosure suits, which this Court had previously deemed to be outside admiralty jurisdiction. The Act was also intended to promote financing of ship construction and purchase, and to provide an exclusive federal forum for preferred ship lien prioritization for certain vessels. 46 U.S.C. 951; James Stewart & Co. v. Rivara, 274 U.S. 614 (1927); G. Gilmore

and C. Black, The Law of Admiralty, 691 (2nd ed. 1975).

An in rem forfeiture proceeding, in contrast, is not a mortgage or lien foreclosure action; it is an exercise of police power, well within the scope of valid state common law actions permissible under the saving to suitors clause. C. J. Hendry Co. v. Moore, 318 U.S. 133 (1942), (citing Smith v. Maryland, 59 U.S. (18 How.) 71 (1855)). A forfeiture proceeding does not prioritize liens; it simply forfeits the interest of owners and lienors. 7/

Moreover, a forfeiture proceeding does not extinguish a lienholder's

7/ The interests of "innocent" lienholders are protected under Alaska law by a remission requirement. State v. Rice, 626 P.2d 104 (Alaska 1981). However, this is not a basis for barring state court jurisdiction. To the extent that there could be parties who establish innocent owner status, and to the extent that their relative priorities are relevant, the state court can apply applicable federal lien law. Madruga v. Superior Court, 346 U.S. 556, 562 (1954).

rights under the Ship Mortgage Act of 1920. 46 U.S.C. 954(a) provides an in personam remedy, by which a lienholder could bring suit to recover the debt, even if his interests in the vessel are forfeited in a state action.

Thus, the F/V Baranof's portrayal of an "irreconcilable jurisdictional conflict" is a mirage. There are neither legal nor policy reasons for construing the Ship Mortgage Act of 1920 to mandate exclusive federal jurisdiction over state in rem forfeiture proceedings whenever a vessel is subject to a preferred ship mortgage. Such a ruling would effectively nullify most state enforcement actions against vessels that violate fisheries conservation laws.

4. There Is No Conflict In The Lower Court Decisions Necessitating This Court's Review.

With only one exception, all state and federal courts that have ruled on the MFCMA's effect on extraterritorial state fishery jurisdiction have agreed that the MFCMA does not divest state

courts of jurisdiction over violations committed by state registered vessels in the FCZ, and that the MFCMA does not preempt state fishery management in the FCZ absent a direct conflict in fishery management regulations. See Anderson Seafoods, Inc. v. Graham, 529 F.Supp. 512 (D. Fla. 1982) (upholding state enforcement in the FCZ of a state prohibition against use of purse seines); People v. Weeren, 607 P.2d 1279 (Cal. 1980), cert. denied, 449 U.S. 839 (1980) (affirming extraterritorial enforcement of California swordfish management regulations); State v. Southeastern Fisheries Association, 415 So.2d 1326 (Fla. Ct. App. 1982) (affirming extraterritorial enforcement of a Florida prohibition on traps for catching saltwater finfish); State v. Millington, 377 So.2d 685 (Fla. 1979) (upholding Florida landing law on minimum shrimp size); State v. Sterling, 448 A.2d 785 (R.I. 1982) (recognizing the authority of states to regulate fisheries in the FCZ, but finding a direct conflict

between Rhode Island's yellowtail flounder restrictions and provisions of a federal fishery management plan).

The only rulings to the contrary came from panels of the intermediate appellate court of Florida. See Livings v. Davis, 422 So.2d 364 (Fla. Ct. App. 1982) and Tingley v. Allen, 397 So.2d 1166 (Fla. Ct. App. 1981). The two panels enjoined, without analysis, extraterritorial enforcement of state shrimping provisions. The Livings case is now pending on appeal before the Florida supreme court. Moreover, these decisions have been expressly rejected by yet another panel of the same court, State v. Southeastern Fisheries Association, 415 So.2d 1326 (Fla. Ct. App. 1982), and by the Florida federal district court. Anderson Seafoods Inc. v. Graham, 529 F.Supp. 512 (D. Fla. 1982).

In short, all federal and virtually all state courts that have ruled on the effect of the MFCMA agree that it does not abrogate state fishery management in the FCZ.

Moreover, NOAA, the federal agency charged with implementation of the MFCMA, whose interpretation of that act is entitled to considerable weight, has taken the position that the MFCMA contemplates continued state management and enforcement jurisdiction. This position is evidenced in the Secretary of Commerce's amicus curiae participation in the instant case in the Alaska supreme court, and in Livings v. Davis, 422 So.2d 354 (Fla. Ct. App. 1982).

Thus, contrary to the F/V Baranof's argument, there is no major uncertainty in state-federal relations that this Court needs to clarify.

The F/V Baranof also argues that the Secretary of Commerce has improperly delegated authority to the State by virtue of his proposal to adopt regulations identical to State king crab management provisions. This issue was never raised or briefed below. It is not ripe for review because the federal government has not yet even published its draft regulations for public review. Moreover, since the proposed regulations

are identical to State conservation laws, their existence more logically supports the conclusion that the State's management program well serves the conservation and management objectives of the MFCMA.

CONCLUSION

The Alaska supreme court's decision is interlocutory and therefore certiorari should be denied. Moreover, the decision falls well within an established body of statutory and case law recognizing the states' legitimate interest in conserving and managing the fisheries off their coasts, and their authority to enforce conservation laws in the context of in rem forfeiture proceedings. The F/V Baranof has raised neither new nor substantial federal questions meriting this Court's review, and their petition should, accordingly, be denied.

DATED this 13th day of July,
1984.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA)
)
Plaintiff,)
)
vs.)
)
F/V BARANOF, its)
paraphernalia, gear, etc.)
)
Respondent.)
)

3KO _____ Civil

COMPLAINT FOR FORFEITURE

NATURE OF ACTION

1. This is a civil action pursuant to AS 16.05.195 for the forfeiture of the F/V Baranof, its paraphernalia and gear.

PARTIES

2. Plaintiff is a sovereign state of the United States.

3. Defendant is a 170.1 foot steel hulled fishing vessel that was used for

catching, transporting, tendering and processing king crab in 1979 and 1980.

4. Defendant vessel is more particularly described as follows:

- a. gross tonnage - 907.57
- b. net tonnage - 797
- c. engine - 1175 horsepower
- d. construction - 1942

5. Defendant vessel has been assigned ADFG No. 34855.

6. Defendant vessel is registered under the laws of the State of Alaska and has been assigned USCG No. 598508.

7. The following persons have an ownership interest in the F/V Baranof.

1. Black Ink, Inc.
2. Exxon
3. Norman Randall
4. Jean Randall
5. Mrs. Richard (Judith) V. Pace
6. D. E. Gilman
7. Aaron Gilman
8. Terry Nierenberg
9. Richard C. White

8. John King was a skipper of the F/V Baranof while it was engaged in commercial fishing for king crab in October and November of 1979 and 1980.

9. Bart Campbell was a skipper of the F/V Baranof while it was engaged in commercial fishing for king crab in October and November of 1979 and 1980.

10. The Rainier National Bank holds a security interest in the F/V Baranof.

11. Defendant vessel was registered for the Bristol Bay registration area T on September 15, 1980.

12. Defendant vessel registration was changed to Pribilof Registration Area Q on October 21, 1980.

13. Defendant vessel was registered for the Southeastern District area, Statistical Area Q on September 15, 1979.

14. Defendant vessel registration was charged to the Pribilof District of Statistical Area Q on October 16, 1979.

15. On each of the above four dates, the vessel owner or agent entered into an Agreement for Use Privilege with the State of Alaska.

FACTS

16. Pursuant to 5 AAC 34.810 fishing for king crab in the Bristol Bay area (Statistical Area T) was opened on September 10, 1980.

17. Pursuant to Emergency Order 4-S-28-80 king crab fishing in the Bristol Bay Area (Statistical Area T) was closed on October 20, 1980.

18. Pursuant to 5 AAC 34.910, fishing for king crab in the Southeastern District of the Bering Sea area (Statistical Area Q) was opened on September 15, 1979.

19. Pursuant to Emergency Order 4-S-25-79 king crab fishing in the Southeastern District of the Bering Sea Area (Statistical Area Q) was closed on October 14, 1979.

20. The F/V Baranof is a vessel used for the taking, delivering or landing of fish within the jurisdiction of the State of Alaska.

FIRST CAUSE OF ACTION

21. Paragraphs 1 through 20 above are incorporated herein.

22. On or about October 22 -23, 1980 the F/V Baranof was used in or in aid of possessing and transporting king crab taken in high seas areas in violation of regulations of the Alaska Board of Fisheries.

23. On or about October 22 - 23, 1980 the F/V Baranof was used in or in aid of possessing king crab knowing that they were taken in violation of regulations of the Board of Fisheries or the Commissioner of Fish and Game. AS 16.10.210; 5 AAC 39.197.

24. The F/V Baranof was used in or in aid of violations of AS 16.05.920(a) on or about October 22 - 23, 1980.

25. On or about October 22 - 23, 1980 the F/V Baranof was used in or in aid of taking or possessing king crab in the Bristol Bay (Statistical Area T) after the area had been closed to king crab fishing. 5 AAC 34.810(b)

26. On or about October 22 - 23, 1980 the F/V Baranof was used in or in aid of possessing unprocessed king crab aboard a vessel licensed for commercial fishing within the Bristol Bay area when

the season was closed and the vessel was not validly registered for the area. 5 AAC 34.090.

27. On or about October 22 - 23, 1980 F/V Baranof was used in or in aid of engaging in fishing for king crab in a statistical area for which the vessel was not registered. 5 AAC 34.085(a)(1).

28. On or about October 22 - 23, 1980 the F/V Baranof was used in or in aid of engaging in fishing for king crab when the season has been closed. 5 AAC 34.085(a)(3); E.O. No. 4-S-28-80.

29. On or about October 22 - 23, 1980 the F/V Baranof was used in or in aid of engaging in fishing in statistical area in violation of regulations governing king crab fishing. 5 AAC 34.085(a)(4).

30. On or about October 22 - 23, 1980, the F/V Baranof was used in or in aid of failing to furnish data to the Alaska Department of Fish and Game necessary for reports required by the department. 5 AAC 39.130(e).

SECOND CAUSE OF ACTION

31. Paragraphs 1 through 20 above are incorporated herein.

32. On or about October 25, 1980 the F/V Baranof was used in or in aid of possessing and transporting king crab taken in high seas areas in violation of regulations of the Alaska Board of Fisheries.

33. On or about October 25, 1980 the F/V Baranof was used in or in aid of possessing king crab knowing that they were taken in violation of regulations of the Board of Fisheries or the Commissioner of Fish and Game. AS 16.10.210; 5 AAC 39.197.

34. The F/V Baranof was used in or in aid of violations of AS 16.05.920(a) on or about October 25, 1980.

35. On or about October 25, 1980 the F/V Baranof was used in or in aid of taking or possessing king crab in the Bristol Bay (Statistical Area T) after the area had been closed to king crab fishing. 5 AAC 34.810(b).

36. On or about October 25, 1980 the F/V Baranof was used in or in aid of

possessing unprocessed king crab aboard a vessel licensed for commercial fishing within the Bristol Bay area when the season was closed and the vessel was not validly registered for the area. 5 AAC 34.090.

37. On or about October 25, 1980 the F/V Baranof was used in or in aid of engaging in fishing for king crab in a statistical area for which the vessel was not registered. 5 AAC 34.085(a)(1).

38. On or about October 25, 1980 the F/V Baranof was used in or in aid of engaging in fishing for king crab when the season has been closed. 5 AAC 34.085(a)(3); E.O. No. 4-S-28-80.

39. On or about October 25, 1980 the F/V Baranof was used in or in aid of engaging in fishing in statistical area in violation of regulations governing king crab fishing. 5 AAC 34.085(a)(4).

40. On or about October 25, 1980 the F/V Baranof was used in or in aid of failing to furnish data to the Alaska Department of Fish and Game necessary for reports required by the department. 5 AAC 39.130(e).

THIRD CAUSE OF ACTION

41. Paragraphs 1 through 20 above are incorporated herein.

42. On or about November 18 - 19, 1980 the F/V Baranof was used in or in aid of possessing and transporting king crab taken in high seas areas in violation of regulations of the Alaska Board of Fisheries.

43. On or about November 18 - 19, 1980 the F/V Baranof was used in or in aid of possessing king crab knowing that they were taken in violation of regulations of the Board of Fisheries or the Commissioner of Fish and Game. AS 16.10.210; 5 AAC 39.197.

44. The F/V Baranof was used in or in aid of violations of AS 16.05.920(a) on or about November 18 - 19, 1980.

45. On or about November 18 - 19, 1980 the F/V Baranof was used in or in aid of taking or possessing king crab in the Bristol Bay (Statistical Area T) after the area had been closed to king crab fishing. 5 AAC 34.810(b).

46. On or about November 18 - 19, 1980 the F/V Baranof was used in or in

aid of possessing unprocessed king crab aboard a vessel licensed for commercial fishing within the Bristol Bay area when the season was closed and the vessel was not validly registered for the area. 5 ACC 34.090.

47. On or about November 18 - 19, 1980 the F/V Baranof was used in or in aid of engaging in fishing for king crab in a statistical area for which the vessel was not registered. 5 AAC 34.085(a)(1).

48. On or about November 18 - 19, 1980 the F/V Baranof was used in or in aid of engaging in fishing for king crab when the season has been closed. 5 AAC 34.085(a)(3); E.O. No. 4-S-28-80.

49. On or about November 18 - 19, 1980 the F/V Baranof, was used in or in aid of engaging in fishing in statistical area in violation of regulations governing king crab fishing. 5 AAC 34.085(a)(4).

50. On or about November 18 - 19, 1980 the F/V Baranof was used in or in aid of failing to furnish data to the Alaska Department of Fish and Game

necessary for reports required by the department. 5 AAC 39.130(e).

FOURTH CAUSE OF ACTION

51. Paragraphs 1 through 20 above are incorporated herein.

52. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of possessing and transporting king crab taken in high seas areas in violation of regulations of the Alaska Board of Fisheries.

53. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of possessing king crab knowing that they were taken in violation of regulations of the Board of Fisheries or the Commissioner of Fish and Game. AS 16.10.210; 5 AAC 39.197.

54. The F/V Baranof was used in or in aid of violations of AS 16.05.920(a) on or about November 21 - 11, 1980.

55. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of taking or possessing king crab in the Bristol Bay (Statistical Area T) after the area had been closed to king crab fishing. 5 AAC 34.810(b).

56. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of possessing unprocessed king crab aboard a vessel licensed for commercial fishing within the Bristol Bay area when the season was closed and the vessel was not validly registered for the area. 5 AAC 34.090.

57. On or about November 21 - 22, 1980 was used in or in aid of engaging in fishing for king crab in a statistical area for which the vessel was not registered. 5 AAC 34.085(a)(1).

58. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of engaging in fishing for king crab when the season has been closed. 5 AAC 34.085(a)(3); E.O. No. 4-S-28-80.

59. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of engaging in fishing in statistical area in violation of regulations governing king crab fishing. 5 AAC 34.085(a)(4).

60. On or about November 21 - 22, 1980 the F/V Baranof was used in or in aid of failing to furnish data to the

Alaska Department of Fish and Game necessary for reports required by the department. 5 AAC 39.130(e).

FIFTH CAUSE OF ACTION

61. Paragraphs 1 through 20 above are incorporated herein.

62. On or about October 1979, the F/V Baranof was used in or in aid of possessing and transporting king crab taken in high seas areas in violation of regulations of the Alaska Board of Fisheries.

63. On or about October 1979, the F/V Baranof was used in or in aid of possessing king crab knowing that they were taken in violation of regulations of the Board of Fisheries or the Commissioner of Fish and Game. AS 16.10.210; 5 AAC 39.197.

64. The F/V Baranof was used in or in aid of violations of AS 16.05.920(a) on or about October 1979.

65. On or about October, 1979, the F/V Baranof was used in or in aid of taking or possessing king crab in the Bristol Bay (Statistical Area T) after

the area had been closed to king crab fishing. 5 AAC 34.810(b).

66. On or about October 1979, the F/V Baranof was used in or in aid of possessing unprocessed king crab aboard a vessel licensed for commercial fishing within the Bristol Bay area when the season was closed and the vessel was not validly registered for the area. 5 AAC 34.090.

67. On or about October 1979, the F/V Baranof was used in or in aid of engaging in fishing for king crab in a statistical area for which the vessel was not registered. 5 AAC 34.085(a)(1).

68. On or about October 1979, the F/V Baranof was used in or in aid of engaging in fishing for king crab when the season has been closed. 5 AAC 34.085(a)(3); E.O. 4-S-28-80.

69. On or about October 1979, the F/V Baranof was used in or in aid of engaging in fishing in statistical area in violation of regulations governing king crab fishing. 5 AAC 34.085(a)(4).

70. On or about October 1979, the F/V Baranof was used in or in aid of

failing to furnish data to the Alaska Department of Fish and Game necessary for reports required by the department. 5 AAC 39.130(e).

SIXTH CAUSE OF ACTION

71. Paragraphs 1 through 20 above are incorporated herein.

72. On or about November 1979, the F/V Baranof was used in or in aid of possessing and transporting king crab taken in high seas areas in violation of regulations of the Alaska Board of Fisheries.

73. On or about November 1979, the F/V Baranof was used in or in aid of possessing king crab knowing that they were taken in violation of regulations of the Board of Fisheries or the Commissioner of Fish and Game. AS 16.10.210; 5 AAC 39.197.

74. The F/V Baranof was used in or in aid of violations of AS 16.05.920(a) on or about November 1979.

75. On or about November 1979, the F/V Baranof was used in or in aid of taking or possessing king crab in the Bristol Bay (Statistical Area T) after

the area had been closed to king crab fishing. 5 AAC 34.810(b).

76. On or about November 1979, the F/V Baranof was used in or in aid of possessing unprocessed king crab aboard a vessel licensed for commercial fishing within the Bristol Bay area when the season was closed and the vessel was not validly registered for the area. 5 AAC 34.090.

77. On or about November 1979, the F/V Baranof was used in or in aid of engaging in fishing for king crab in a statistical area for which the vessel was not registered. 5 AAC 34.085(a)(1).

78. On or about November 1979, the F/V Baranof was used in or in aid of engaging in fishing for king crab when the season has [sic] been closed. 5 AAC 34.085(a)(3); E.O. No. 4-S-28-80.

79. On or about November 1979, the F/V Baranof was used in or in aid of engaging in fishing in statistical area in violation of regulations governing king crab fishing. 5 AAC 34.085(a)(4).

80. On or about November 1979, the F/V Baranof was used in or in aid of

failing to furnish data to the Alaska Department of Fish and Game necessary for reports required by the department. 5 AAC 39.130(e).

WHEREFORE, plaintiff prays to this court:

1. That the defendant F/V Baranof, its paraphernalia and gear be forfeited to the State of Alaska, pursuant to AS 16.05.195.

2. That the State of Alaska be awarded attorneys' fees and costs including expenses for maintenance and storage of the defendant items.

3. For such further relief as the court may deem proper and just.

DATED at Anchorage, Alaska this 11 day of May, 1980.

WILSON L. CONDON
ATTORNEY GENERAL

By: S/

John G. Gissberg
Assistant Attorney General

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA)
)
Plaintiff,)
)
vs.)
)
F/V BARANOF, its)
paraphernalia, gear, etc.)
)
Respondent.)
)

3KO _____ Civil

AFFIDAVIT OF ROBERT BOUTANG

STATE OF ALASKA)
)
) ss.
THIRD JUDICIAL DISTRICT)

Robert Boutang, first duly
sworn, deposes and says:

I am an investigator with the
Fish and Wildlife Protection Division,
Department of Public Safety, and am
stationed in Anchorage, Alaska. I was
responsible for the investigation of the
violations of Alaska's king crab fishing
laws and regulations committed through

the use of the F/V Baranof, its paraphernalia and gear; I have read the complaint for forfeiture in the above captioned case and know the factual contents thereof, the allegations contained therein are true to the best of my knowledge.

DATED at Anchorage, Alaska,
this 11 day of May, 1981.

S/ Robert Boutang

SUBSCRIBED AND SWORN TO before me
this 11 day of May, 1981.

S/ _____
Notary Public in and for Alaska
My Commission expires: _____

APPENDIX B

NORTH PACIFIC FISHERY MANAGEMENT COUNCIL
P. O. Box 103136
Anchorage, Alaska 99510
(907)-274-4563
FTS 271-4064

James O. Campbell, Chairman
Jim H. Branson, Executive Director

605 West 4th Avenue
Anchorage, Alaska 99510

TENTATIVE SCHEDULE

For Review, Approval, and Implementation of the BS/AI King Crab FMP

July 16, 1984	Day of receipt
Aug. 3, 1984	F clears and forwards regulatory package to A, Day 19.
Aug. 13, 1984	DOC clears publication of proposed regs and provides docket number to F/M12, Day 29.
Aug. 14, 1984	F/M12 files proposed regs with OFR, Day 30.

Aug. 24, 1984 F/M11 sends Washington office comments on FMP, FEIS, RIR/IRFA to PD, Day 40.

Sept. 3, 1984 RD transmits draft decision memo to F/M11, Day 50. F/M1 and GCF hold decision meeting (conference call with Region), Day 60.

Sept. 18, 1984 End of public comment period, Day 75.

Sept. 25, 1984 RD approves/partially disapproves FMP, transmits decision memo to F/M11, Day 82.

Oct. 2, 1984 F approves package: forwards package to A, Day 89.

Oct. 22, 1984 OMB clears final regs and notifies DOC; DOC notified F/M12 and provides docket number, Day 109.

Oct. 23, 1984 F/M12 files final
 regs with FR, Day
 110.

Oct. 29, 1984 Federal
 Register publishes
 final regs, Day 115.

Nov. 27, 1984 End of APA delayed
 effectiveness period,
 regs effective.



APPENDIX C

Federal Statutes

16 U.S.C. 1801(b):

(b) Purposes

It is therefore declared to be the purposes of the Congress in this chapter

--

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development by the United States fishing industry of fisheries which are currently under-utilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development.

16 U.S.C. 1856(a):

(a) In general

Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. For purposes of this chapter, except as provided in subsection (b) of this section, the jurisdiction and authority of a State shall extend (1) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

16 U.S.C. 1861(d):

(d) Jurisdiction of district courts

The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter Any such court may, at any time --

(1) enter restraining orders or prohibitions;

(2) issue warrants, process in rem, or other process;

(3) prescribe and accept satisfactory bonds or other security; and

(4) take such other actions as are in the interest of justice.

16 U.S.C. 1861(e):

(e) Definitions

For purposes of this section --

(1) The term "provisions of this chapter" includes (A) any regulation or permit issued pursuant to this chapter, and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 1821(b) or (c) of this title, with respect to fishing subject to the exclusive fishery management authority of the United States.

(2) The term "violation of any provision of this chapter" includes (A) the commission of any act prohibited by section 1857 of this title, and (B) the violation of any regulation, permit, or agreement referred to in paragraph (1).

28 U.S.C. 1257(3):

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. 1333(1):

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. 951:

§ 951. Lien of preferred mortgage; foreclosure; jurisdiction; procedure; foreign ship mortgages

A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in section 925 of this title, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found with-

in the United States. Failure to give notice to any such person, as required by this section, shall not constitute a jurisdictional defect; but the libellant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subsection (c) of section 941 of this title.

Foreign ship mortgages: As used in sections 951 to 954 of this title, the term "preferred mortgage" shall include, in addition to a preferred mortgage made pursuant to the provisions of this chapter, any mortgage, hypothecation, or similar charge created as security upon any documented foreign vessel (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons) if such mortgage, hypothecation, or similar charge has been duly and validly executed in accordance with the laws of the foreign nation under the laws of which the vessel is documented and has been duly registered in accordance with such laws in a public register either at the port of registry of the vessel or at a central office; and the term "preferred mortgage lien" shall also include the lien of such mortgage, hypothecation, or similar charge: Provided, however, That

such "preferred mortgage lien" in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries, performed or supplied in the United States.

46 U.S.C. 954(a):

§ 954. Suits in personam in admiralty on default

(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

APPENDIX D

Alaska Statutes, Regulations, and Constitutional Provisions

AS 16.05.221(a):

Sec. 16.05.221. Boards of Fisheries and Game. (a) For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

AS 16.05.251:

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas and bag limits on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;

(7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures

considered necessary to the resources of the state;

(9) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish research, management, education and information and to train persons for fish management;

(10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(11) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(12) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that

adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

- (1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
- (2) local residency; and
- (3) availability of alternative resources.

AS 16.05.475:

Sec. 16.05.475. Registration of fishing vessels. (a) A person may not employ a fishing vessel in the water of Alaska unless it is registered under the laws of the state. Vessels registered under the laws of another state, and persons residing in another state, are not excused from this provision.

(b) The term "employ," as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any activities involving the use or navigation of fishing vessels.

(c) The term "registered under the laws of the state," as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any existing requirements regarding registration, licenses, permits, and similar matters imposed by law or regulation together with modifications of them and with any additional requirements the board finds necessary to maximize the authority of the state to apply and enforce fisheries regulations under the Fishery Conservation and Management Act of 1976 (P.L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 et seq.).

(d) The term "fishing vessel," as used in this section, means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for

(1) fishing, or

(2) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

AS 16.05.490(a):

Sec. 16.05.490. Vessel license. (a) As a condition to delivery or landing of fish or engaging in commercial fishing in the state, a license is required for a commercial vessel, including a vessel used in charter service for the recreational taking of fish and shellfish.

AS 16.05.520:

Sec. 16.05.520. Number Plate. (a) The vessel license includes a permanent number plate. The number plate shall be accompanied by a tab affixed to it designating the year to be fished. A number plate is not transferable, and it shall be considered a permanent fixture upon the vessel upon which it is originally placed. It shall be securely fastened well forward on the port side in plain sight. On a vessel with a superstructure the plate shall be

fastened on the port side of the superstructure. A number plate remains the property of the state. If a permanent number plate is accidentally defaced, mutilated, destroyed, or lost, the person owning or operating the vessel shall immediately apply for and may obtain a duplicate upon furnishing the Commercial Fisheries Entry Commission with the pertinent facts and a payment of \$2.

5 AAC 34.020:

5 AAC 34.020. Registration. (a) Registration areas are designated as follows:

(1) superexclusive: areas E, H, and M;

(2) exclusive: areas A, K, O, and T;

(3) nonexclusive: areas R and Q.

(b) A vessel or gear registered for a superexclusive registration area may not be used to take king crab in any other registration area during that registration year. A vessel or gear registered for an exclusive registration area may not be used to take king crab in any superexclusive registration area or any other exclusive registration area

during that registration year. A vessel or gear registered for one or both of the nonexclusive registration areas may also be registered for one exclusive registration area, but may not be used to take king crab in more than one exclusive registration area or in any superexclusive registration area during that registration year.

(c) The owner or his authorized agent shall register all king crab fishing gear and each king crab fishing vessel for a registration area before operating in that area, except that king crab vessels must be registered for registration area H before the scheduled season opening date.

(d) The registration year shall be June 28 through June 27.

(e) A registration is not valid until the vessel has been inspected as required in 5 AAC 34.030(a) or (b). Once a registered vessel has been inspected for a superexclusive or exclusive registration area, its registration may not be voided to take king crab in another superexclusive or exclusive registration area. A registration may be voided to take other species of crab in other king crab registration areas.

(f) The late registration of a king crab fishing vessel may be permitted by the commissioner in the case of the loss of a registered king crab fishing vessel by sinking or destruction. The late registration may only be for the area in which the lost vessel was registered. For purposes of this subsection, loss of a vessel is considered to mean such vessel is incapable of being used to take king crab during the open king crab season in the area for which it is registered. Loss of a vessel must be documented by submission of proof, in writing, that the vessel is sunk or destroyed. The replacement vessel may not be one which has been used to take king crab in another exclusive registration area during the current registration year.

(g) Repealed 6/30/79.

(h) A vessel validly registered to take king crab in a king crab registration area may not take any species of crab in any other king crab registration area. No vessel may be validly registered for more than one king crab registration area at a time.

(i) A valid registration for any registration area is invalid 24 hours after the closure of the season for the registration area.

(j) Notwithstanding (b) of this section, a vessel registered for statistical area M may be used to take king crab in the Semidi Islands district of statistical area K as described in 5 AAC 34.405(d).

5 AAC 34.030:

5 AAC 34.030. Landing and Inspection Requirements. (a) Except as required in (b) of this section, within 24 hours before a season opening or at any time during the open season before taking king crab, any vessel registered for an exclusive registration area must have its holds or live tanks inspected by a local representative of the department at inspect points specified in 5 AAC 34. No king crab may be on board at the time of inspection. Successful completion of the inspection validates the registration for the area. During the period 24 hours before the season opening in an exclusive registration area until the season closure in the area, the inspection requirements of this subsection do not apply to any registered king crab vessel which does not have any saltwater circulation system in its holds or live tanks.

(b) Registered king crab vessels must have their holds, live tanks, and

freezers inspected by a local representative of the department at inspection points specified in 5 AAC 34 within the following periods and areas: starting 116 hours after the opening of statistical areas T, M, O, and the Pribilof district of statistical area Q, and within 48 hours before taking or processing king crab in statistical areas R and Q. No king crab may be on board at the time of inspection. Successful completion of the inspection validates the registration for the area.

(c) Except as provided in (d) of this section, all vessels must land all king crab in the area for which they are validly registered at the time.

(d) A vessel validly registered for an area which desires to land king crab in another registration area must contact by radio a local representative of the department prior to leaving the statistical area encompassing the area for which the vessel is registered, and shall submit to such inspection at such location as the representative may require. The representative contacted by the vessel must be located in the registration area for which the vessel is validly registered at the time. A vessel acting pursuant to this authorization shall at the time of landing its catch have no greater amount of king crab on

board than were present at the time of any inspection.

(e) A vessel making radio contact pursuant to (d) of this section shall state to the local representative of the department the amount of king crab on board at the time.

(f) When a vessel lands king crab pursuant to the authorization in (d) of this section, the registration under which the vessel is operating becomes invalid. In order to again become validly registered for an area, the vessel must comply with (a) or (b) of this section.

(g) For purposes of this section, a vessel validly registered for the registration area in statistical areas Q and T landing king crab at Dutch Harbor, Akutan or King Cove will be deemed to have landed their catch in the area for which they are validly registered at the time.

(h) For purposes of (d) of this section, operators of vessels registered for the registration area in statistical areas Q and T shall make the required radio contact at Dutch Harbor.

(i) The commissioner may suspend any or all of the requirements of (d), (e)

and (f) of this section for particular registration areas if he finds that to do so would be in the public interest.

(j) Repealed 6/14/80.

(k) Repealed 6/30/79.

5 AAC 39.120(a):

5 AAC 39.120. Registration of Commercial Fishing Vessels. (a) A person who owns a commercial fishing vessel or his authorized agent shall register that vessel by completing a vessel license application or renewal form and submitting it to the Commercial Fisheries Entry Commission. Vessel registration is required before fishing or transporting fish in any waters of Alaska.

(1) A vessel, if it is in compliance with all regulations governing registration and if it displays a license issued under AS 16.05.530, is considered to be registered under the laws of the state and may be employed in the taking or transporting of fish;

(2) In this section

(A) "employ" or "employed" means taking or attempting to take fish, or transporting fish which have been taken

or any operation of a vessel aiding or assisting in the taking or transporting of fish;

(B) "in compliance with all regulations governing registration" includes vessel registration required by 5 AAC 31.020, 5 AAC 31.070, 5 AAC 32.020, 5 AAC 32.070, 5 AAC 34.020, 5 AAC 34.070, 5 AAC 35.020, 5 AAC 35.070, 5 AAC 38.020 and 5 AAC 38.070, and includes district or subdistrict registration requirements of 5 AAC 03 - 5 AAC 38, and includes the provisions of this section;

(C) "registered under the laws of the state" means that a vessel displays a license described in 20 AAC 05.958 and issued under AS 16.05.530, and that the registration provisions of 5 AAC 03 - 5 AAC 39 have been complied with and evidence of compliance is immediately available at all times during fishing or transporting operations, and can be shown upon request to any authorized representative of the department;

(3) It is unlawful to take, attempt to take or possess unprocessed fish aboard a vessel in the waters of Alaska unless the vessel is registered under the laws of the state.

5 AAC 39.120(b):

(b) Area registration requirements for shellfish vessels are as specified in the registration regulations in 5 AAC 31 - 5 AAC 38.

Alaska Const. art VIII, § 2:

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Alaska Const. art. VIII, § 4:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Office-Supreme Court, U.S.
FILED

(3)
AUG 30 1984

ALEXANDER L STEVENS,
STATE CLERK

No. 83-1851

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

F/V BARANOF, its gear, paraphernalia,
etc.;

BARANOF FISHERIES, A Washington Limited
Partnership;

RAINIER NATIONAL BANK; and

RAINIER NATIONAL BANK, as Trustee for
Universal Seafoods, Ltd.,

Petitioners,

vs.

STATE OF ALASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S SUPPLEMENTAL BRIEF
IN OPPOSITION

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: SARAH ELIZABETH McCACKEN
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Counsel for Respondent

30PP

BEST AVAILABLE COPY

No. 83-1851

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1984

F/V BARANOF, its gear,
paraphernalia, etc.;
BARANOF FISHERIES, A Washington
Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee
for Universal Seafoods, Ltd.

Petitioners,

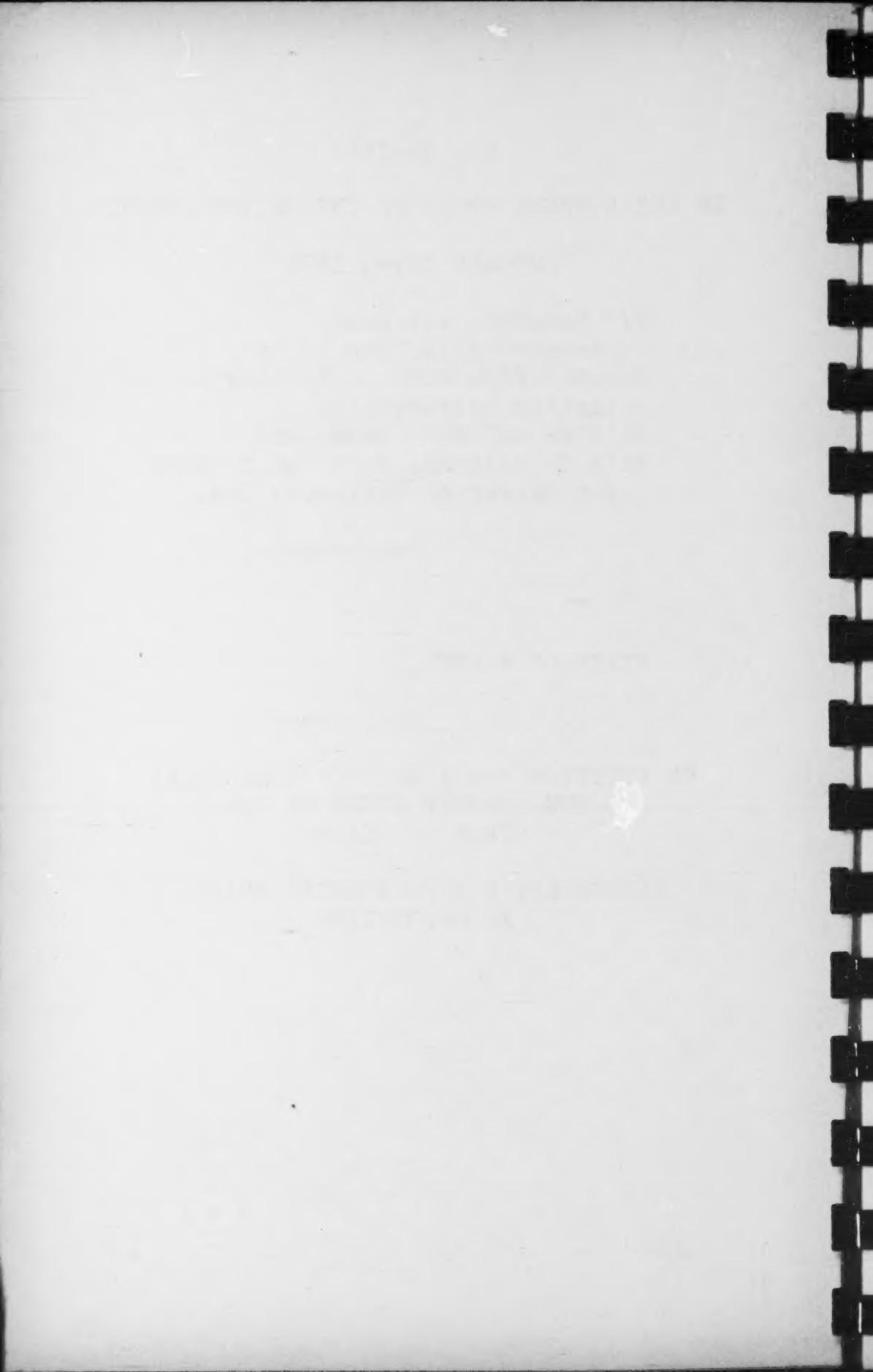
v.

STATE OF ALASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALASKA

RESPONDENT'S SUPPLEMENTAL BRIEF
IN OPPOSITION



ARGUMENT

This supplemental brief, submitted pursuant to Supreme Court Rule 22.6, is to notify the Court that State v. Southeastern Fisheries Association, 415 So.2d 1326 (Fla. Ct. App. 1982), cited in the State of Alaska's Brief In Opposition at pages 26 and 27, was reversed by the Florida Supreme Court (on grounds other than those for which it was cited), sub nom. Southeastern Fisheries Association v. Department of Natural Resources, No. 62,288 (Fla., April 26, 1984) (Appendix A). The decision has not yet been published in the regional reporter, and the State of Alaska was unaware of it when the State filed its Brief in Opposition, on July 16, 1984.

The Florida Supreme Court's reversal is based upon a finding that the Florida legislature never expressed any intent to extend its fish trap ban beyond state waters; the court did not make any finding of preemption by the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801--1882 ("MFCMA"). The court did, however, reference (without

comment as to its validity) an unpublished decision of the United States District Court for the Southern District of Florida, Bethell v. Florida, No. 82-1516 CIV-JWK (D. Fla. Sept. 29, 1983), appeal filed, 11th Cir. No. 83-5727 (Appendix B), which had held extraterritorial enforcement of Florida's fish trap ban to be preempted by the MFCMA. That latter decision was, however, based upon a finding of direct conflict between state and federal law in light of the National Marine Fisheries Service's proposed regulation specifically allowing use of fish traps in the fisheries conservation zone.

Thus, the reversal, on independent state grounds, of the Florida Court of Appeals decision in State v. Southeastern Fisheries Association, 415 So.2d 1326, does not alter the conclusion, explained in the State of Alaska's Brief in Opposition at pages 25--28, that there is no conflict in the lower court decisions necessitating this Court's review.

CONCLUSION

For the reasons articulated in the State of Alaska's Brief in Opposition and this Supplemental Brief, the F/V Baranof's petition for a writ of certiorari should be denied.

DATED this 23rd day of August, 1984.

Respectfully submitted,

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

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Counsel for Respondent,
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APPENDIX A

SUPREME COURT OF FLORIDA
No. 62,288

SOUTHEASTERN FISHERIES ASSOCIATION,
INC., et al., Petitioners,

vs.

DEPARTMENT OF NATURAL RESOURCES,
STATE OF FLORIDA, Respondent.

[April 26, 1984]

OVERTON, J.

This is a petition to review a decision of the First District Court of Appeal reported as State, Department of Natural Resources v. Southeastern Fisheries Ass'n, 415 So.2d 1326 (Fla. 1st DCA 1982). The district court found Florida's fish trap law, section 370.1105, Florida Statutes (Supp. 1980), to be constitutional and concluded that the law is enforceable by the state in its territorial waters as well as in the extra-territorial waters beyond Florida.

The district court certified the following question to be one of great public importance:

Does Section 370.1105, Florida Statutes (1980 Supp.), apply to waters outside the territorial boundaries of the State of Florida, notwithstanding the absence of a provision expressing the intention that its provisions are to be given extraterritorial effect?

415 So.2d at 1331. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. While this case was pending before this Court, the United States District Court for the Southern District of Florida held that the subject statute, to the extent it applied to extra-territorial waters, had been preempted by the federal government and was unconstitutional. Bethell v. Florida, No. 82-1516-CIV-JWK (S.D. Fla. Sept. 29, 1983). We asked the parties to submit supplemental briefs on the preemption issue.

For the reasons expressed, we quash, in part, the decision of the First

District Court of Appeal, answer the certified question in the negative, and hold that in order to enforce the unlawful-possession provisions of the statute the state must establish the intent to use the traps in waters within the territorial limits of the state.

The petitioner, Southeastern Fisheries, has asserted (1) that the statute is void for vagueness and overbreadth and (2) that the statute cannot now be enforced in the extra-territorial waters beyond Florida, particularly in view of the asserted federal preemption.

The statute in question, section 370.1105, Florida Statutes (Supp. 1980), makes it unlawful to fish for saltwater finfish with any traps, or to possess any fish trap other than those traps specifically exempted by the act. The act, however, does not expressly state that its provisions apply in the extra-territorial waters beyond Florida. The statute reads as follows:

- (1) It is unlawful for any person, firm, or corporation to set, lay, place, or otherwise attempt to fish for saltwater finfish with any trap other than:
- (a) A crab, crawfish, or shrimp trap specifically permitted under s. 370.13, s. 370.135, s. 370.14, or s. 370.15;
 - (b) A pinfish trap not exceeding 2 feet in any dimension, with a throat or entrance not exceeding 3 inches in height by three-quarters of an inch in width; or
 - (c) A black sea bass trap which has a biodegradable panel and a throat or entrance, the narrowest point of which is not more than 5 inches in height by 2 inches in width and the outer dimensions of which do not exceed 2 feet in height, 2 feet in width, and 2 feet in depth. However, such traps may be used only north of latitude 27° N.

(2) It is unlawful for any person, firm, or corporation to possess any fish trap other than a trap specified in paragraph (a), paragraph (b), or paragraph (c) of subsection (1) or to land, take, sell, or offer to sell any saltwater finfish caught by any trap other than a trap specified in paragraph (a), paragraph (b), or paragraph (c) of subsection (1).

(3) Any person who violates any provision of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any vessel, vehicle, or equipment used in violation of this section, and any fish caught with a trap in violation of this section, shall be seized and may be forfeited.

Petitioners brought a declaratory judgment action seeking the proper construction of the statute. In a motion

for summary judgment, petitioners attacked the constitutional validity of the statute. The trial court granted the summary judgment, finding (1) that if the statute is constitutional it is only enforceable in the state's territorial waters because the statute does not clearly indicate a legislative intent to regulate conduct in the extra-territorial waters beyond Florida; (2) that the statute is unconstitutional because it is impermissibly vague in that it fails to define the term "illegal fish trap;" and (3) that the statute is unconstitutionally "overbroad" because it prohibits the mere possession of illegal fish traps on dry land.

The district court reversed and concluded "that the term 'fishtrap' is not 'so vague that men of common intelligence must necessarily guess at its meaning.'" 415 So.2d at 1327 (citing State v. Hagan, 387 So.2d 943 (Fla. 1980)). As these terms are used in the statute, the district court found, "they provide 'a sufficiently definite warning as to the proscribed conduct when measured by

common understanding and practice.'" Id. In concluding that the statute is not vague, the district court relied on this Court's decision in State v. Hagan, in which the terms "trawl net" and "trawling operation" were found to have a definite meaning in the fishing industry sufficient to satisfy due process requirements. The district court also found that the statute is not overbroad because there is no constitutional right to possess fish traps. Finally, the district court held that although there is absent from the statute an express legislative intent that it apply extra-territorially, "the possession and land provisions [of the statute] indicate a legislative intent that the law should" so apply. 415 So.2d at 1330. In so holding, the district court receded from the principle it enunciated in Burns v. Rozen, 201 So.2d 629, 631 (Fla. 1st DCA 1967), that "[e]xtraterritorial effect of an enactment is not to be found by implication."

On the first point, we agree with the district court that the statute

is neither overbroad nor vague. Too often, courts and lawyers use the terms "overbroad" and "vague" interchangeably. It should be understood that the doctrines of overbreadth and vagueness are separate and distinct. The overbreadth doctrine applies only if the legislation "is susceptible of application to conduct protected by the First Amendment." Carricarte v. State, 384 So.2d 1261, 1262 (Fla.), cert. denied, 449 U.S. 874 (1980) (citing Dandridge v. Williams, 397 U.S. 471 (1970)). See also McKenney v. State, 388 So.2d 1232 (Fla. 1980); State v. Ashcraft, 378 So.2d 284 (Fla. 1979). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). The vagueness doctrine has a broader application, however, because it was developed to assure compliance with the due process clause of the United States Constitution. The overbreadth argument is clearly not appropriate here because the possession and use of fish traps are not activities protected by the first amendment.

The fish trap statute can, however, be challenged as vague. A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement. In determining whether a statute is vague, common understanding and reason must be used. Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. Hagan. Further, courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided. Courts must determine whether or not the party to whom the law applies has fair notice of what is prohibited and whether the law can be applied uniformly.

In the instant case we agree with the district court that the fish trap statute places fishermen on notice that fish traps are unlawful, and that there are certain exceptions which are sufficiently described in the statute. We hold that the statutory prohibition of

the use and possession of certain types of fish traps, as expressed in section 370.1105, with specific exclusions for lawful traps, is constitutional. If the statutory definition of "fish trap" were more precise, then the purpose of the statute could be easily circumvented. Our conclusion is in accordance with the Hagan rationale. We find that the term "fish trap" is not so vague that persons of common intelligence must guess at its meaning. More importantly, the term has a definite meaning within the fishing industry. We further conclude that the law is sufficiently definite to be reasonably and uniformly enforced.

The certified question concerns the application of section 370.1105 beyond state waters when evidence of that intent is not expressed in the statute. If we find there was an intent that this statute was to apply in extra-territorial waters beyond Florida, we must then determine whether the federal government has preempted the regulation of the use of fish traps in these extra-territorial waters.

At the outset we recognize that the state can regulate and control the operation of vessels and the acts of its citizens in waters outside Florida's territorial limits, provided, however, that the federal government has not preempted state regulation. See Skiriotes v. Florida, 313 U.S. 69 (1941). The Florida Legislature has expressly done so in other instances. For example, section 370.15(2)(a), Florida Statutes (1979), makes it "unlawful for any person, firm or corporation to catch, kill, or destroy shrimp or prawn within or without the waters of this state." (Emphasis added.) See State v. Millington, 377 So.2d 685 (Fla. 1979). In section 370.15(2)(a) the legislature clearly stated its intent that the statute apply within or without the waters of Florida. No such terminology is contained in section 370.1105, the statute in issue here.

In Bethell v. Florida, the United States District Court for the Southern District of Florida expressly held that "Section 370.1105, Florida Statutes (1981) is declared

unconstitutional to the extent that it attempts to exercise the authority of the State of Florida over the area which is beyond the territorial seas of the State of Florida" Slip op. at 1 (Summary Final Judgment). In so holding, the United States District Court recognized Skiorotes v. Florida, but determined that the Fishery Conservation and Management Act, 16 U.S.C. § 1801(b)(1976), applied. The court found that under that act the State of Florida participated as a member of the South Atlantic Fishery Management Council and in June 1982 accepted a fishery management plan which allowed the limited use of fish traps to catch salt-water finfish. The court expressly found that "whether there exists a conflict with federal law in this area of regulation is no longer open to question" and concluded that "section 370.1105 Florida Statutes has been preempted by 16 U.S.C. 1801 et seq." Bethell v. Florida, slip op. at 3 (Order Granting Plaintiff's Motion for Summary Judgment). The court cited the Florida Third District Court of Appeal's decisions in Tingley v. Allen,

397 So.2d 1166 (Fla. 3d DCA 1981), and Livings v. Davis, 422 So.2d 364 (Fla. 3d DCA 1982), as being consistent with its decision. Finally, the court held that enforcement of section 370.1105 would violate the commerce and equal protection clauses of the United States Constitution.

The attorney general of Florida takes issue with the United States District Court's decision, noting that he is challenging that decision, and he requests that we hold this case in abeyance pending federal court resolution of his appeal. We decline to do so. The issue is whether or not Florida should be allowed to regulate the use of fish traps in extra-territorial waters pursuant to section 370.1105. The state's authority to regulate in those waters is only by the consent and acquiescence of the federal government. We find that if there is to be a confrontation between the state and the federal government, then the legislature should expressly declare that it is its intent that the statute apply in extra-territorial waters, as it

did in section 370.15(2)(a) concerning shrimp. Since there is no clear expression by the legislature that it is unlawful "to set, lay, place or otherwise attempt to fish for saltwater finfish with any trap" outside the territorial waters of Florida, we find it would be improper to apply this statute to extra-territorial waters by implication and confront the federal government with its asserted validity.

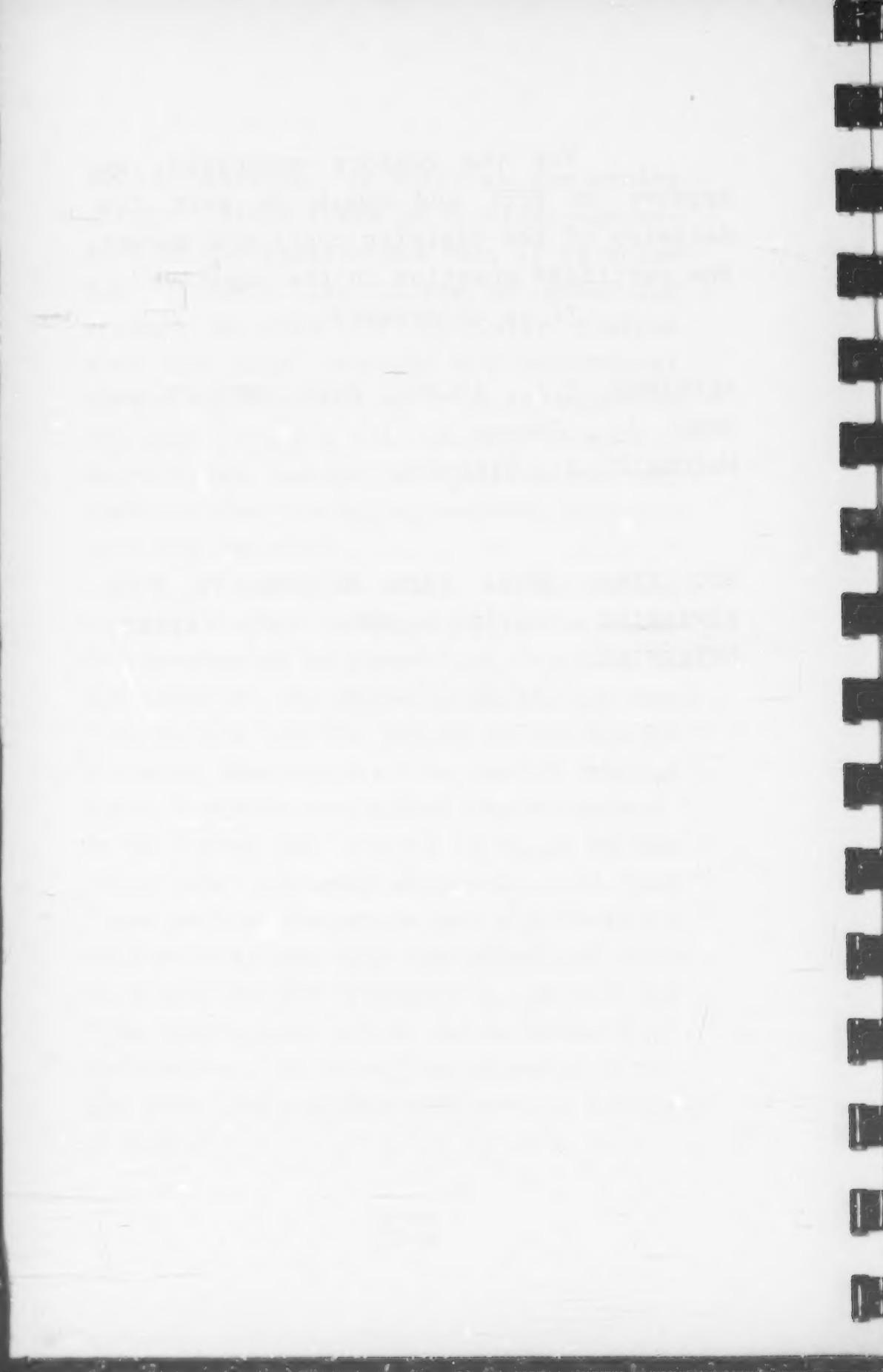
Having so found, we must accept the petitioners' argument that the unlawful possession of these fish traps in the territory of the state or in its territorial waters has the effect of unconstitutionally restricting the lawful use of these traps in extra-territorial waters. We hold that the statute is valid to prohibit the use and possession of fish traps within the state and its territorial waters, but that the state, in order to prosecute for unlawful possession of fish traps, must prove, as an element of possession, the intent to unlawfully use the fish traps in the territorial waters of Florida.

For the reasons expressed, we approve in part and quash in part the decision of the district court and answer the certified question in the negative.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, EHRLICH and
SHAW, JJ., Concur
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED,
DETERMINED.



APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-1516-Civ-JWK

UNION NORMAN BETHELL,

Plaintiff,

vs.

STATE OF FLORIDA, DE-
PARTMENT OF NATURAL
RESOURCES, et. al.,

ORDER GRANTING
PLAINTIFF'S
MOTION FOR
SUMMARY JUDGE-
MENT

Defendants.

This matter is before the Court on motions for summary judgment filed on behalf of the respective parties. The Court agrees that there are no genuine issues as to any material fact and, therefore, this action may be disposed of by summary judgment.

Section 370.1105, Florida Statutes (1981) prohibits the use and possession of fishtraps to fish for saltwater finfish. Plaintiff is seeking to enjoin the enforcement of this statute by state

officials outside of the territorial limits of the State of Florida i.e. in the Fishery Conservation Zone (FCZ). Essentially, Plaintiff argues that Section 370.1105 has been preempted by the Fishery Conservation and Management Act, 16 U.S.C. § 1801 et. seq. He additionally contends that the attempted enforcement of the statute in the FCZ (established pursuant to 16 U.S.C. § 1811) results in a violation of the Commerce and Equal Clauses of the U.S. Constitution.

The State of Florida counters that under 16 U.S.C. § 1856(a)¹ (which permits regulation of vessels registered under the laws of the State of Florida) it may regulate the extra-territorial acts of its citizens beyond its boundaries where there exists no conflict with federal law or regulation. See Skiriotes v. State of Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941). In further support of its motion for summary judgment, the States cites to State of Florida, Dept. of Natural Resources v. Southeastern Fisheries Assoc., Inc., 415

So.2d 1326 (Fla. 1st D.C.A. 1982) which upheld the extraterritorial application of Section 370.1105 and Anderson Seafood Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982) in which the Court found that Section 370.08(3), Florida Statutes (1981) (prohibiting fishing with a "purse seine") did not conflict with any federal law. For the reasons set forthherein [sic], the Court does not find these citations of authority persuasive and, therefore, concludes that plaintiff is entitled to summary judgment.

In 1976, the U.S. Congress enacted the Fishery Conservation and Management Act to conserve and manage the fishery resources found off the coasts of the United States 16 U.S.C. § 1801(b). Consistent therewith, a Fishery Conservation Zone (FZC) [sic] was established within which the United States assumed exclusive fishery management authority. 16 U.S.C. §§ 1801(b)(1)(A), 1811, 1812. Title 16 also established Regional Fishery Management Councils to develop "Fishery Management Plans." 16 U.S.C. 1852. The State of Florida is a member

of the South Atlantic Fishery Management Council which in cooperation with the National Marine Fisheries Service in June 1982 drafted a Fishery Management Plan (FMP). This plan proposed a regulation permitting the limited use of fish traps to catch saltwater finfish. In light of the above, this Court believes that the issue of whether there exists a conflict with federal law in this area of regulation is no longer open to question and specifically finds that section 370.1105 Florida Statutes has been preempted by 16 U.S.C. 1801 et. seq. The Third District Court of Appeal of the State of Florida has reached the same conclusion with respect to Section 370.151(2) Florida Statutes (shrimping regulations) Tingley v. Allen, 397 So.2d 1166 (Fla. 3rd DCA 1981) and Livings v. Davis, 422 So.2d 364 (Fla. 3d DCA 1982).

The Court in addition concludes that the enforcement of Section 370.1105, Florida Statutes in the FCZ would violate the Commerce and Equal Protection Clauses. Any attempted application of this section to out-of-state vessels

would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause. Moreover, to uphold [sic] the application of this section with respect to Florida registered vessels would result in a denial of equal protection. Boats registered in other states would be able to use fish traps in the FCZ (as permitted under the FMP) and reap the economic benefits while Florida registered vessels would be prohibited from engaging in those same fishing activities. This result directly contravenes the mandate of 16 U.S.C. § 1851(4) which clearly provides that "conservation and management measures shall not discriminate between residents [sic] of different states" ...[sic]

Accordingly, it is
ORDERED AND ADJUDGED that Plaintiff's motion for summary final judgment is GRANTED.

DONE AND ORDERED in chambers at
Miami, Florida, this 29th day of
September, 1983.

S/

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

CC: David Paul Horan, Esquire
Kevin X. Crowley, Esquire

FOOTNOTE

¹ "§1856. State Jurisdiction

(a) "In general. Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. ... No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State."

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

File Number 82-1516-Civ-JWK

UNION NORMAN BETHELL,

Plaintiff,

vs.

DR. ELTON J. GISSENDANNER, Executive Director of the FLORIDA DEPARTMENT OF NATURAL RESOURCES, Individually; J. J. BROWN, DEPARTMENT OF NATURAL RESOURCES, Individually; LOUIS S. LIVINGS, FLORIDA MARINE PATROL, Individually; JOEL E. AILLS, FLORIDA MARINE PATROL, Individually,

Defendants.

/

NOTICE OF APPEAL

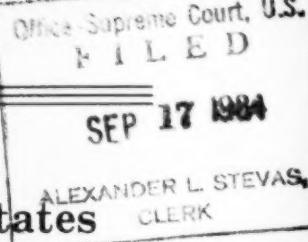
Notice is hereby given that Dr. Elton J. Gissendanner, J. J. Brown, Louis S. Livings and Joel E. Aills, Defendants above named, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order Granting Plaintiff's Motion For Summary Judgment, the Summary Final Judgment and the Order On

Motion To Dismiss entered in this action
on the 19th day of September, 1983.

Respectfully submitted,

S/

KEVIN X. CROWLEY
Deputy General Counsel
Department of Natural Resources
3900 Commonwealth Boulevard
Suite 1003, Douglas Building
Tallahassee, Florida 32303
904/488-9223



IN THE
Supreme Court of the United States

October Term, 1983

F/V BARANOF, its gear, paraphernalia, etc.;
BARANOF FISHERIES, a Washington Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee for
UNIVERSAL SEAFOODS, LTD.,
Petitioners,

v.

STATE OF ALASKA,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ALASKA

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION

Terence P. Lukens of
KARR, TUTTLE, KOCH,
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LIST OF PARTIES

The petition for Writ of Certiorari filed by petitioners on May 9, 1984 contains a complete list of all parties and all related corporations.

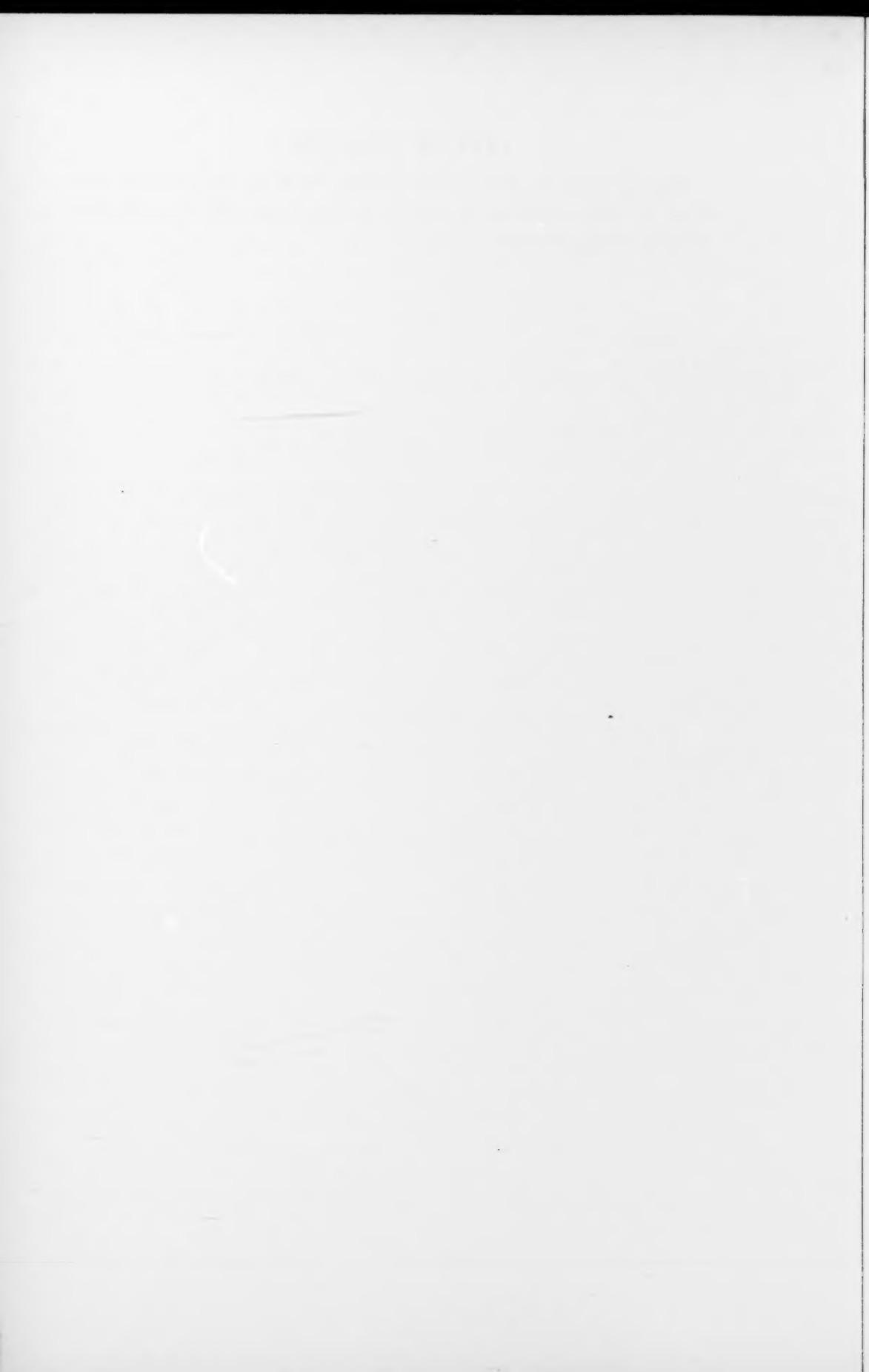


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IN THE
Supreme Court of the United States

October Term, 1983

F/V BARANOF, its gear, paraphernalia, etc.;
BARANOF FISHERIES, a Washington Limited Partnership;
RAINIER NATIONAL BANK; and
RAINIER NATIONAL BANK, as Trustee for
UNIVERSAL SEAFOODS, LTD.,
Petitioners,

v.

STATE OF ALASKA.
Respondent,

ARGUMENT

1. The Judgment Below Is Final for the Purpose of Review.

The decision of the Alaska Supreme Court below is reviewable under 28 U.S.C. § 1257 as the final judgment rendered by the highest court of the state of Alaska. While the Alaska Supreme Court remanded this case to the superior court for trial on the merits, the court rendered a final decision on all federal issues and made a final assertion of jurisdiction subject to no right of further state court review. Finality does not necessarily mean the last judgment possible to be made in a case. *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152 (1964). In deciding whether a

ruling is final for the purpose of review, this Court has followed a pragmatic, rather than a technical, approach. *Id.* at 152 (construing 28 USC § 1291); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (28 USC § 1291).

This matter fits within the type of case discussed in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975) where this Court treats a decision on a federal issue as a final judgment for the purpose of 28 USC § 1257 and takes jurisdiction before completion of the lower court proceedings when the highest court of the state has finally determined the federal issue present in the case, even though there are further proceedings contemplated in the lower state court. *Id.* at 477.

This Court should review the judgment below of the Alaska Supreme Court because all federal issues were judged with finality by the state court, so any additional proceedings in this case will not produce federal questions which may require review at a later date, and delay in reviewing the Alaska state court decision will seriously erode the federal policies set forth in the Magnuson Fishery Conservation and Management Act, 16 USC § 1801 *et seq.*, of providing an exclusive federal forum for alleged fishing violations outside each state's waters and of preempting state assertion of jurisdiction over non-residents fishing outside state waters. See *Cox Broadcasting Corporation v. Cohn*, *supra*, 420 U.S. at 482-83. In *Rosenblatt v. American Cyanamid Company*, 36 S.Ct. 1, 3 (1965), Mr. Justice Goldberg summarized this Court's prior decisions on the requirements of finality as expressed in *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963) and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), namely: (1) final assertion of jurisdiction with no possible review of that issue by the state court, (2) possibility of serious erosion of national policy, and (3) the state judgment is on an issue

anterior to and separable from the merits. The decision for which review is sought meets these tests. The state of Alaska has asserted final jurisdiction over this action, has dismissed the Baranof's assertion that proper jurisdiction should rest in the federal district court, and has effectively removed all of Baranof's federal defenses and all federal issues from this lawsuit. The state's judgment on subject matter jurisdiction and forum is separable from the state law issues remaining in the case. The state's assertion of jurisdiction threatens erosion of the federal policy favoring a federal forum for uniform interpretation and application of the Magnuson Fishery Conservation and Management Act. Baranof should not be forced to take the risk of an adverse judgment at trial on the merits in order to obtain the benefits of federal preemption and a federal forum available under the Magnuson Fishery Conservation and Management Act. See *Rosenblatt v. American Cyanamid Company*, *supra*, 86 S.Ct. at 3; *Shaffer v. Heitner*, 433 U.S. 186, 195 (1977); *Cox Broadcasting Corporation v. Cohn*, *supra*, 420 U.S. at 485 (1975).

In sum, the decision of the Alaska Supreme Court is final under the standards established by this Court and review is appropriate and timely.

2. This Matter Presents a Substantial Federal Question.

a. *The Alaska Supreme Court Has Decided a Novel Issue of Federal Law in a Manner Conflicting With Past Decisions of This Court.*

This Court has not yet had the occasion to interpret the jurisdiction and authority of the states under the Magnuson Fishery Conservation and Management Act for fishing performed by non-residents outside the state three-mile seaward boundary. The decision below leaves the state of Alaska free to regulate fishing in waters outside its three-mile water boundary by all fishermen, both citizens and non-citizens of Alaska. Although the Magnuson Fishery Conservation and Management Act prohibits state regulation of fishing vessels

beyond its seaward boundary unless those vessels are registered in the state, 16 USC § 1856(a), the Alaska Supreme Court interprets the term "registered" to include the purchase of an Alaskan fishing license required by the state of all fishermen fishing outside Alaskan waters. This interpretation of the Magnuson Fishery Conservation and Management Act is contrary to the Act's envisioned system of regional fishery controls formulated and monitored by regional fishery management councils, and is in direct conflict with decisions of this Court allowing state regulation of fishing outside state waters only if the fishermen resided in the state. *See Skiriotes v. Florida*, 313 U.S. 69 (1941). The F/V Baranof is owned by Washington residents and is home ported in the state of Washington; thus, Alaska's regulation of the F/V Baranof's fishing activities outside state waters is contrary to the principles set forth in *Skiriotes v. Florida*, *supra*.

b. Federal Issues Presented by this Case are Not Moot, but are Timely and Important.

The state of Alaska argues in its brief in opposition to the Baranof's petition for review that the issues in this case regarding preemption of state law and state jurisdiction by the Magnuson Fishery Conservation and Management Act soon may be mooted because the federal government expects to adopt a king crab fishery management plan within the near future. Brief of Respondent at 12. This argument fails for several reasons. First, the North Pacific Regional Fishery Management Counsel first submitted a fishery management plan for king crab in the Aleutian Island/Bering Sea area to the Secretary of Commerce for review on May 25, 1982. To date, the Secretary of Commerce has not approved the plan. Second, the North Pacific Fishery Management Council contemplates that the king crab fishery management plan will incorporate state fishery regulations and that the state regulations will be approved as federal regulations and published in the federal register. *See* 49 Fed. Reg. 33,033

(1984) (to be codified at 50 CFR Part 676) (proposed August 20, 1984). Under this scenario, the issue of preemption remains. Finally, the Baranof has asserted that whether or not the state of Alaska has authority to regulate fishing outside state waters, any action to enforce alleged fishing violations in the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act must be brought in federal district court for the state of Alaska rather than in the state superior courts. 16 U.S.C. § 1861.

A decision in this case by this Court would help resolve conflicts between and give guidance to the various lower courts which have attempted to delineate state fishing regulatory authority after the enactment of the Magnuson Fishery Conservation and Management Act. Even final approval of a fishery management plan for Alaska king crab will not moot the present case or prevent the issues in this case from recurring elsewhere. Lower courts around the country continue to grapple with the accommodation of federal and state interests on this issue. See, e.g., *Bethell v. Florida*, No. 82-1516 Civ., Slip op. (D. Fla. Sept. 29, 1983), *appeal filed*, No. 83-5727 (11th Cir.); *Hjelle v. Brookes*, 377 F. Supp. 430 (D. Alaska 1974), *vacated as moot*, 424 F. Supp. 595 (D. Alaska 1976); *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981); *People v. Weeren*, 26 Cal. App. 3d 654, 163 Cal. Rptr. 255, 607 P.2d 1279 (1980), *cert. denied*, 449 U.S. 839 (1980); *State v. Southeastern Fisheries Association, Inc.*, 415 So.2d 1326 (Fla. Dist. Ct. App. 1982), *rev'd sub nom.*, *Southeastern Fisheries Association v. Department of Natural Resources*, No. 62,288, Slip op. (Fla. April 26, 1984); *Tingley v. Allen*, 397 So.2d 1166 (Fla. Dist. Ct. App. 1981); *State v. Sterling*, 448 A. 2d 785 (R. I. 1982).

Resolution of this continuing uncertainty and lack of uniformity continues to be appropriate, even in the face of possible future Council action.

c. ***The Decision Below Impermissibly Expands the Alaskan In Rem Forfeiture Proceedings Over Vessels Operated by Non-Citizens Outside the State's Boundaries.***

The Alaska Supreme Court confuses the state's *in personam* jurisdiction over fishermen, which is limited solely by the requirement that the fishermen be residents of the state of Alaska, *see, e.g., Skiriotes v. Florida, supra*, with the state's *in rem* admiralty jurisdiction over the vessel which is limited to matters arising under the "saving to suitors" clause of 28 USC § 1333. This confusion has resulted in a decision, unsupported by statute or case law, expanding Alaska's *in rem* forfeiture jurisdiction beyond the state waters in which it was exercised (or saved unto suitors) at common law, *see, C.J. Hendry Company v. Moore*, 318 U.S. 125 (1942), onto the high seas, outside state boundaries, in which the state only has *in personam* jurisdiction of its citizens. *See Skiriotes v. Florida, supra.*

The state of Alaska also ignores the exclusive admiralty interests involved by asserting it may forfeit the interests of persons holding recorded preferred ship mortgages on vessels seized for fishing violations, *see Brief for Respondent at 24*. The state of Alaska fails to cite any authority to extinguish such interests. In fact, preferred ship mortgage interests can be impacted only by a court of the United States, *see 46 U.S.C. § 961*, not a court of the state of Alaska.

The decision below sanctions Alaska's assertion of *in rem* jurisdiction over a vessel operating outside state waters and over ship mortgage interests in that vessel without any historical or legal precedent and represents an unwarranted departure from accepted federal admiralty law.

CONCLUSION

The decision by the court below is final as to all federal issues and is separable from the state issues remaining in the case. Review should be granted at this time to prevent erosion of the federal policy favoring preemption of state authority to regulate vessels outside state waters and the federal policy favoring the resolution by the U.S. district courts of all disputes over fishing outside state waters. The issues presented are novel and a decision by this Court will provide valuable guidance for the other courts that continue to interpret the Magnuson Fishery Conservation and Management Act and seek to accommodate state and federal interests under that act.

Respectfully submitted this
14th day of September, 1984.

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